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No. 081595

IN THE

Supreme Court of the United States

STEVEN MANNING,

Petitioner,

v.

UNITED STATES OF AMERICA, ROBERT BUCHAN, AND GARY MILLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 28 U.S.C. § 2676, which renders "[t]he judgment in an action" against the United States under the FTCA a bar to "any action" against its employee for the same injury, also bars a plaintiff from pursuing a *Bivens* claim in the same suit, even though this Court has recognized that "Congress views FTCA and *Bivens* as parallel [and] complementary" *Carlson* v. *Green*, 446 U.S. 14, 20 (1980).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Steven Manning respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's decision sought to be reviewed, Appendix ("App.") 1a-18a, is reported at *Manning* v. *United States*, 546 F.3d 430 (7th Cir. 2008). The decision of the United States District Court for the Northern District of Illinois, App. 19a-37a, is unreported.

JURISDICTION

The Seventh Circuit's opinion and judgment was entered on October 6, 2008. The Seventh Circuit's order denying rehearing, App. 38a-39a, was entered on January 26, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

Section § 2676 of the FTCA provides as follows:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2676.

STATEMENT OF THE CASE

A Northern District of Illinois jury found that two Federal Bureau of Investigation ("FBI") agents framed former Chicago police officer Steven Manning for murder and kidnapping, causing him wrongly to be convicted and imprisoned fourteen years, and awarded him $6.6 million in damages on his claim under *Bivens* v. *Six Unknown Named Fed. Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). This petition concerns the trial court's decision almost two years later to vacate the judgment entered on that *Bivens* verdict and award. The court did not dispute that the FBI agents committed egregious violations of Manning's constitutional rights, causing him grave injury. Rather, the court held, under 28 U.S.C. § 2676 (the so-called "FTCA judgment bar") that Manning's *Bivens* claim was "barred" by the subsequent entry of judgment on his parallel claim under the Federal Tort Claims Act against the United States as the FBI agents' employer. That judgment was in favor of the government, leaving Manning with nothing for his injuries.

This case presents a mature and deep split of authority on an issue of substantial importance: whether the FTCA judgment bar, which renders "[t]he judgment in an action" against the United States under the FTCA a bar to "any action" against its employee for the same injury, bars not only a subsequent lawsuit under *Bivens*, but also a parallel *Bivens* claim in the same suit in which the FTCA judgment is entered. The Circuit Courts invite plaintiffs to allege both FTCA and *Bivens* claims together in the same complaint. *Hoosier Bancorp of Indiana, Inc.* v. *Rasmussen*, 90 F.3d 180, 185 (7th Cir.

1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994). The issue thus arises whenever a plaintiff (who is commonly *pro se*), accepting this invitation, pursues the FTCA claim to judgment.

The courts have split five to one. The Ninth Circuit has held that judgment on an FTCA claim does not bar a *Bivens* claim unless it is brought in a subsequent suit. *Kreines* v. *United States*, 959 F.2d 834, 838 (9th Cir. 1992).

Along with the Seventh Circuit in this case, four other courts have held that judgment on an FTCA claim bars, not only a subsequent lawsuit under *Bivens*, but also a *Bivens* claim brought in the same suit. *Unus* v. *Kane*, 565 F.3d 103, 122 (4th Cir. 2009); *Harris* v. *United States*, 422 F.3d 322, 333-35 (6th Cir. 2005); *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840, 858 (10th Cir. 2005); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989).

Although this Court has never squarely ruled on the question, its existing precedent strongly suggests that the majority approach is unsound. Specifically, in holding that the FTCA does not preempt the *Bivens* remedy or create an equally effective remedy for constitutional violations, this Court unequivocally stated that "Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Carlson* v. *Green*, 446 U.S. 14, 20 (1980). On the majority view, the causes of action are not "parallel [and] complementary," but rather mutually exclusive, because the plaintiff may pursue only one to final judgment. Worse yet, a judgment results, not only when a plaintiff pursues his

claim to a ruling on the merits, but whenever he presses his claim *too far*, such that the district court concludes that the government would be prejudiced by allowing him to dismiss it without prejudice. In practical terms, it is impossible for a plaintiff to predict how far is too far, and so he must choose which cause of action he will pursue at the outset.

The depth of the split of authority demonstrates that the issue is recurring and important. The Seventh Circuit's ruling warrants this Court's review.

1. Petitioner Steven Manning is the only Chicago police officer to have served time on Illinois' Death Row. After his convictions were overturned, he brought this civil action, asserting claims under both *Bivens* and the FTCA. The district court properly exercised jurisdiction over Petitioner's claims against the United States under 28 U.S.C. § 1346(b)(1), and over Petitioner's *Bivens* claims, brought pursuant to the Fifth and Sixth Amendments to the United States Constitution, under 28 U.S.C. § 1331.

Respondents moved for summary judgment, which the district court denied, prompting an interlocutory appeal on the issue of qualified immunity. The Seventh Circuit affirmed the denial of qualified immunity. *Manning* v. *Miller*, 355 F.3d 1028 (7th Cir. 2004).

A single, four-week trial was conducted on Petitioner's *Bivens* claim against the FBI agents and his FTCA claim against the United States. The former were tried to a jury and the latter were tried to the bench. After hearing testimony from more than thirty

witnesses, and reviewing hundreds of exhibits, the jury returned a verdict for Petitioner on his *Bivens* claim, and awarded him $6.6 million in damages.

In denying the FBI agents' post-trial motion challenging the sufficiency of the evidence to support the *Bivens* verdict, the district court concluded that "there was, without question, a reasonable basis in the record to support the verdict, and the jury's determination plainly was not against the manifest weight of the evidence." *Manning* v. *Miller*, 2005 WL 3078048, *4 (N.D. Ill. Nov. 14, 2005) ("The jury was a highly educated and sophisticated group, and its verdict – particularly the special verdict form that was given to the jury on defendants' proposal – reflects the careful and discerning job that it did evaluating the evidence and claims during its lengthy deliberations. This was anything but a runaway jury. . ."). On March 23, 2005, the district court entered judgment on the jury's verdict.

On September 28, 2006, the Court ruled in favor of the United States on Petitioner's FTCA claim. In rejecting Petitioner's FTCA claim, the district court specifically noted that it was "persuaded that at various junctures, the two FBI agents whom [Petitioner] sued exceeded their proper roles as investigators." Nevertheless, the Court found that Petitioner had failed to establish the absence of probable cause, an element of his FTCA claim. *Manning* v. *United States*, 2006 WL 3240112, *1 (N.D. Ill. Sep. 28, 2006) ("The Court deplores the agents' improper actions, but it concludes that even absent those actions, probable cause existed to prosecute Manning for both the kidnapping and the murder"). The court was quick to point out, however,

that its conclusion was "in no way inconsistent with the jury's finding on the constitutional law claims against the two FBI agents" because the elements for the FTCA claim, which focused primarily on the existence *vel non* of probable cause, "turn on legal standards that differ from those governing the claims the jury decided." *Id.*

On December 26, 2006, more than 21 months after the jury's verdict in favor of Petitioner on his *Bivens* claims, the district court held that the jury's verdict was "barred" and vacated the prior judgment. The court reasoned that the subsequent judgment for the government on Petitioner's FTCA claim barred the prior judgment. Petitioner, who had won a jury verdict almost two years earlier, was then left with no *Bivens* judgment, and no recovery at all.

2. The Seventh Circuit affirmed, announcing a new rule for *Bivens* claimants. According to the Seventh Circuit, plaintiffs who make the "strategic choice" to proceed to verdict against the United States on FTCA claims do so bearing the risk that a judgment will nullify any favorable jury verdicts on related *Bivens* claims. App. 9a. The way that Plaintiff supposedly should have proceeded, and the path the Seventh Circuit instructs future litigants to travel, is to ask the district court to dismiss a pending FTCA claim after it has already been tried but before a verdict is rendered, and then hope that the district court grants such a dismissal without prejudice. App. 10a. The Seventh Circuit's decision acknowledged the circuit split. App. 14a-17a.

Petitioner filed a motion for rehearing, highlighting his argument that neither the district court nor the

Seventh Circuit had addressed, namely that there is no certainty that a court will allow a dismissal without prejudice once the case progresses to the point of trial. In fact, it is highly likely that a court would not allow such a dismissal, making the Seventh Circuit's reconciliation not viable. Without the ability to obtain dismissal without prejudice, the dismissal of the FTCA claim would have resulted in a "judgment," thus triggering the judgment bar. Accordingly, Petitioner argued for rehearing on the grounds that the new rule announced by the Seventh Circuit is not only fatally flawed, but creates enormous uncertainty for all future plaintiffs pursuing *Bivens* and FTCA claims in the same action.

Petitioner's motion for rehearing was denied without comment, and this Petition followed.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision deepens an already substantial split of authority regarding whether 28 U.S.C. § 2676 bars not only a subsequent lawsuit under *Bivens*, but also a *Bivens* claim brought in the same suit. Further, the Seventh Circuit's reason for siding with application of the judgment bar ignores the substantial basis for holding that Congress intended the judgment bar to apply only to claims brought in a subsequent lawsuit.

1. As noted above, circuit courts have split five to one in favor of applying the judgment bar to *Bivens* claims brought in the same suit as the FTCA judgment giving rise to the bar. The Ninth Circuit has declined to

apply the bar in such circumstances, at least when the FTCA judgment is in favor of the defendant. The Fourth, Fifth, Sixth and Tenth, along with the Seventh Circuit here, have all held that the FTCA judgment bar applies to a *Bivens* claim brought in the same suit.

The Seventh Circuit here confronted that issue in a factual context identical to that presented in *Kreines*, 959 F.2d 834: an FTCA judgment for the United States following a *Bivens* judgment for the plaintiff. The Seventh Circuit reached the opposite conclusion to that in *Kreines*.

In *Kreines*, 959 F.2d 834, as here, the plaintiff's *Bivens* and FTCA claims were tried simultaneously and the jury found in favor of the plaintiff on his *Bivens* claim. *Id.* at 836. And as here, the court denied plaintiff's claim under the FTCA months later. *Id.* The court entered judgment on plaintiff's *Bivens* claim and the defendants appealed, arguing that the FTCA judgment barred the *Bivens* award previously entered in the same suit. The Ninth Circuit started its analysis by observing that "[a]lthough the language of the [FTCA judgment bar] refers to a bar of 'any action,' it fails to resolve the question of whether the bar applies to other claims raised in the same action." *Id.* at 838. The court found the statutory language ambiguous, and so proceeded to consider Congress' intent in creating the judgment bar, concluding that "Congress' primary concern in enacting the bar was to prevent multiple lawsuits on the same facts." *Id.* However, because "[t]hat concern is absent when suit is brought contemporaneously for FTCA and other relief," the judgment bar did not apply to the plaintiff's *Bivens* remedy. *Id.* The court also concluded

that, in addition to preventing multiple lawsuits, the FTCA judgment bar prohibits dual recovery against the United States and its employees. *Id.* The facts did not implicate that prohibition, however, because the FTCA judgment was against the plaintiff. *Id.*

Until the Seventh Circuit's decision here, the Ninth Circuit was the only circuit to have confronted application of the judgment bar in the precise factual context presented here—an FTCA judgment for the government barring a *Bivens* award previously entered in the same suit. The relevant facts presented in *Trentadue* were identical with one exception—there, the United States, not the plaintiff, prevailed on the FTCA claim. The Tenth Circuit found that distinction dispositive. The Tenth Circuit agreed with the Ninth Circuit's *Kreines* analysis that "the language of the [judgment bar] does not speak to situations where FTCA and non-FTCA claims are tried together in the same action." *Id.* at 859. Nonetheless, the Tenth Circuit held that the FTCA judgment bar applied to the parallel *Bivens* claim because its purpose was to preclude not only multiple lawsuits but also multiple recoveries against the United States and its employees. *Id.* Since the plaintiff had won his FTCA claim against the United States, the court determined that the judgment bar precluded a second recovery against its employees. *Trentadue*, 397 F.3d at 859.

Three additional circuits, the Fourth, Fifth, and Sixth, have held that an FTCA judgment bars a simultaneous or subsequent *Bivens* judgment in the same action. *Unus*, 565 F.3d 103, *Harris*, 422 F.3d 322, and *Rodriguez*, 873 F.2d 814. The Seventh Circuit's

Manning decision joined *Unus*, *Harris*, *Trentadue*, and *Rodriguez* – and rejected *Kreines* – in holding that the FTCA judgment bar applies to a *Bivens* claim in the same suit. *Manning* thus deepened an already-existing circuit split on that issue.

Not one of the majority decisions offers any reasoned analysis to support the view that the judgment bar applies to claims brought in the same suit as the claim giving rise to the bar. In particular, no decision even attempts to reconcile its holding with this Court's statement in *Carlson* that the FTCA and *Bivens* are meant to be "parallel" and "complementary." And none engage in any analysis of the judgment bar's language or purpose. Rather, each is directly or indirectly based on citation to dicta contained in *Aetna Cas. & Sur. Co.* v. *United States* 570 F.2d 1197, 1201 (4th Cir. 1978), *Gilman v. United States*, 206 F.2d 846, 848 (9th Cir. 1953) and *United States v. Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952). But these decisions themselves are devoid of any reasoned analysis of the issue. *See* Stefan Sciaraffa, *Section 2676 of the FTCA: Why It Should Not Bar Contemporaneously Filed Bivens Claims* 24 Am. J. Crim. L, 147, 165 & nn.104 07, 170-72 (1996) (tracing string of authorities cited for holding that judgment bar applies to claims in same actions). Indeed, all predate this Court's decision in *Carlson*.

Lower courts are in need of guidance regarding how to manage cases that assert both *Bivens* and FTCA claims in the same lawsuit. This issue arises often. In fact, more than one hundred cases addressing the FTCA judgment bar have arisen, many of which were filed and pursued *pro se*.

The Court should also grant the petition to resolve the circuit split on the narrower issue presented by this case: whether the "valence" of the FTCA judgment (for or against the government) determines the applicability of the FTCA judgment bar. The *Kreines*, *Trentadue*, and *Manning* decisions reach divergent results on these questions, with both *Kreines* (explicitly) and *Trentadue* (implicitly) concluding that whether the FTCA judgment is for or against the government determines the applicability of the judgment bar.

Because the lower courts are deeply divided, this Court should review this case and clarify that the FTCA judgment bar does not apply to *Bivens* claims brought in the same suit.

2. Resolution of the issue whether the judgment bar applies to *Bivens* claims in the same suit determines what remedies are available for every constitutional violation by a federal employee. The decisions of the courts concluding that the FTCA judgment bar applies in the circumstances presented here cannot be reconciled with this Court's precedent. Further, those decisions contravene the purposes of the FTCA in general, and the judgment bar in particular.

2a. It is common for a plaintiff to file a *Bivens* claim and FTCA claim together in the same lawsuit. Indeed, this Court has made it "crystal clear" that the *Bivens* and FTCA causes of action are intended to be "parallel" and "complementary," not exclusive. *Carlson*, 446 U.S. 14, 20 (citing to Sen. Rep. No. 93-588, discussing how FTCA is supposed to be a "counterpart" to the *Bivens* remedy). The FTCA's legislative history discusses this

specifically, as the Supreme Court summarized in *Carlson*: "when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers [], the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 19-20 (emphasis added).

In *Carlson*, this Court explained why *Bivens* and FTCA remedies are intended to be "parallel" and "complementary," namely, because the "FTCA is not a sufficient protector of the citizens' constitutional rights" due to four key differences. *Carlson*, 446 U.S. at 23. First, *Bivens* is a "more effective deterrent" than the FTCA because it entails the threat of personal financial liability on the part of government employees. *Id.* at 21. Second, *Bivens* allows for punitive damages, which "are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights." *Id.* at 22. The FTCA, by contrast, expressly prohibits punitive damages. See 28 U.S.C. § 2674. Third, a *Bivens* claim allows the plaintiff to present his evidence to a jury, while an FTCA suit does not. *Id.* at 22 (citing 28 U.S.C. § 2402). Fourth, FTCA actions are governed by state law, as in this case, but "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." *Id.* at 23.[1]

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[1] If there were any doubt whether this Court has correctly analyzed this remedial framework, Congress surely vanquished it when it expressly ratified *Carlson*'s interpretation of the FTCA in the Westfall Act. Section 5 of that Act amended (Cont'd)

If a plaintiff cannot pursue both an FTCA claim and a *Bivens* claim to judgment, then he must choose between them. It follows then that, under the majority approach, the causes of action are neither parallel nor complementary, but rather mutually exclusive. No court applying the FTCA judgment bar to a *Bivens* claim has been able to reconcile such a holding with this Court's recognition that the causes of action are "parallel" and "complementary."

2b. The Seventh Circuit attempted to reconcile its interpretation of the judgment bar with *Carlson*, by positing that a plaintiff who prevails on a *Bivens* claim is then faced with a "strategic" choice. *Manning*, 536 F.3d at 434-35. He may choose, on the one hand, to safeguard his jury award by voluntarily dismissing the FTCA claim or, on the other hand, to discard his jury award by pursuing his FTCA claim to judgment. In common terms, he may opt to keep his award or to "see what's behind door number two." On that view, *Bivens* and FTCA claims thereby remain parallel and complementary because Plaintiffs are free to dismiss the FTCA claim at any time before judgment. See *Manning*, 536 F.3d at 435 ("Both remedies remain as viable causes of action, but because of the broad language of [Section 2676], plaintiffs must make strategic choices in pursuing the remedies").

(Cont'd)

28 U.S.C. § 2679(b) to make clear that a plaintiff's FTCA remedy is not exclusive of his right to sue under *Bivens*. See Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564.

The Seventh Circuit's conclusion that plaintiffs face a strategic choice after judgment on their *Bivens* claim rests on the premise that a voluntary dismissal of the FTCA claim following trial, but prior to judgment, would not count as a "judgment" under section 2676, triggering the judgment bar. That premise is false. If a plaintiff moved to voluntarily dismiss his FTCA claim so late in the litigation, the dismissal would almost certainly be one with prejudice, and thus trigger Section 2676 and (on the Seventh Circuit's view) bar the *Bivens* claim, just the same as a verdict would. See, e.g., *Farmer* v. *Pernell*, 275 F.3d 958, 962 (10th Cir. 2001) ("[T]he district court's order dismissing [plaintiff's] FTCA claim . . . stated the dismissal was with prejudice. Hence the FTCA judgment against [plaintiff] bars her *Bivens* claims as a matter of law"). Moreover, the uncertainty that a dismissal could be with prejudice will effectively preclude Plaintiffs from pursuing both of these "parallel" and "complementary" remedies.

To avoid that result, the Seventh Circuit is explicitly assuming that plaintiffs could obtain a dismissal of the FTCA claim without prejudice as of right. Therein lies the glaring flaw in the Seventh Circuit's reasoning. First, it seems clear that no court would or could grant the plaintiff a dismissal of claims without prejudice following a trial, while the fact-finder was in the process of deliberating. *United States* v. *Outboard Marine Corp.*, 789 F.2d 497, 502 (7th Cir. 1986) (dismissal without prejudice is not available once the case proceeds to the point that the defense would suffer legal prejudice); *Tolle* v. *Carroll Touch, Inc.*, 23 F.3d 174, 178 (7th Cir. 1994) ("[u]nfavorable rulings by the district court is not an acceptable basis" to grant a motion to dismiss without

prejudice). Even the uncertainty discussed above prevents plaintiff from taking the risk of pursuing both claims.

Indeed, it would likely have been reversible error here to dismiss the FTCA claim without prejudice had Manning sought to do so after the trial in the manner the Seventh Circuit has now held he should have – particularly where the defense would obviously resist vigorously, having nothing left to lose. *Kapoulas* v. *Williams Ins. Agency*, 11 F.3d 1380, 1385 (7th Cir. 1993) (affirming a refusal to dismiss without prejudice where "discovery had already been well underway" and plaintiff's motion evinced "an intent to avoid further adverse rulings by the district court"). In short, if Petitioner had done exactly what the Seventh Circuit faulted him for not doing, the dismissal of the FTCA claim would have created a judgment on the FTCA claim. And, under the Seventh Circuit's reading of Section 2676, this judgment on the FTCA claim would have required the district court to vacate the *Bivens* verdict under Section 2676, which provides that a judgment on an action gives rise to the judgment bar. *Phillips* v. *Shannon*, 445 F.2d 460, 462 (7th Cir. 1971) ("[A] dismissal with prejudice is a final judgment on the merits"). In other words, even if Petitioner had not made the now-condemned "strategic choice" of proceeding with the FTCA claim, he still would have triggered Section 2676 – no more and no less than the adverse FTCA judgment would have. Plaintiff literally could not win. The *Bivens* judgment was doomed no matter the choice he made.

If a plaintiff makes any "strategic" choice in pursuing his FTCA claim, that choice is made long before a jury rules on his concurrent *Bivens* claim. The necessary implication of the Seventh Circuit's view is that a plaintiff irrevocably chooses to pursue his FTCA remedy, and to forego his *Bivens* remedy, the moment he presses his FTCA claim *too far*. How far is too far? The answer is: when the district court concludes that the government would be prejudiced by granting a dismissal without prejudice. But it is impossible for a plaintiff to know where that line is, and thus he cannot know when the "choice" is upon him. The only choice a plaintiff makes, therefore, is the choice he makes at the outset whether to allege an FTCA claim alongside his *Bivens* claim.

Indeed, the Fourth Circuit expressly adopted the Seventh Circuit's "strategic choice" paradigm in affirming the dismissal of the plaintiffs' *Bivens* claim *on the pleadings*, based on its award of summary judgment for the United States on a concurrent FTCA claim. See *Unus*, 565 F.3d at 122. The Court explained that the plaintiffs "chose to pursue their claims against the federal agent defendants through *Bivens* as well as under the FTCA," and in so doing "risked having a judgment on the FTCA claims operate to bar their *Bivens* theories." *Id.* The Fourth Circuit's decision thus makes explicit the hidden implication of the Seventh Circuit's view—that the only strategic choice involved in pursuing an FTCA claim occurs at the outset.

Condemning that choice cannot be squared with this Court's precedent. Because the Seventh Circuit has adopted an interpretation of 28 U.S.C. § 2676 that is

contrary to this Court's precedent, this Court should review this case and clarify that the FTCA judgment bar does not apply to *Bivens* claims brought in the same suit.

3. This result is not compelled by the judgment bar's purposes or plain language. On the contrary, those decisions applying the judgment bar to *Bivens* claims brought in the same suit undermine the aims of the judgment bar and the FTCA. Further, the interpretation of the statute adopted by those decisions is inconsistent with its plain language.

3a. As the Ninth Circuit noted in *Kreines* v. *United States*, "[t]he statutory bar was conceived by Congress primarily to prevent dual recoveries *arising from additional, subsequent litigation*." 959 F.2d 834, 838 (9th Cir. 1992) (emphasis added); see also *Will* v. *Hallock*, 546 U.S. 345, 354-55 (2006) (noting that Section 2676 was designed to "avoi[d] duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4402, p. 9 (2d ed. 2002)). This is precisely the concern that motivates the doctrine of *res judicata*. And, as the Ninth Circuit noted in *Kreines*, it is "absent when suit is brought contemporaneously for FTCA and other relief." 959 F.2d at 838.

This Court, too, has previously recognized – and legislative history confirms – that the statute is "analogous" to "the defense of claim preclusion, or *res judicata*." *Will*, 546 U.S. at 354. As with its *res judicata* analogue, Section 2676 is designed to "avoi[d]

duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" *Id.* at 354-55 (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4402, p. 9 (2d ed. 2002)). The threat of multiple lawsuits is not remotely implicated where, as here, the plaintiff raises all of his claims in a single action.

Further, the FTCA's principal purpose is to channel litigation over government wrongdoing away from individual employees. *Melo* v. *Hafer*, 13 F.3d 736, 744 (3d Cir. 1994). As discussed above, those courts applying the judgment bar to *Bivens* claims in the same suit, however, force plaintiffs to choose at the outset which remedy to pursue. Forced to choose, many plaintiffs will choose *Bivens* over the FTCA in order to preserve their rights to a jury and punitive damages, neither of which is available in a claim under the FTCA. *See, e.g., Cochran* v. *Barnes*, Slip Op., 2009 WL 790192, *2 (N.D. Ind. Mar. 20, 2009) (noting that *pro se* plaintiff bringing a claim under *Bivens* "emphasize[d] in his complaint that he does not wish [his] action to be construed as . . . seeking relief under the [FTCA]" in order to avoid the effect of judgment bar as interpreted by *Manning*). Furthermore, once they have pursued a *Bivens* claim to judgment, they can then file an FTCA claim against the government as employer by way of a subsequent lawsuit because no court would apply the FTCA judgment bar to a *Bivens* judgment entered in a prior lawsuit. Thus, to the extent the purpose of the FTCA is to channel litigation over government wrongdoing away from individual employees, that purpose is not served by the majority view.

3b. The decisions applying the judgment bar to *Bivens* claims brought in the same suit is contrary to the judgment bar's plain language which, by its terms bars "action[s]," not claims. The only coherent reading of the bar is that the two "action[s]" – one creating the bar and one being barred – are brought in separate lawsuits. An "action" is "[a] civil or criminal judicial proceeding." Black's Law Dictionary 31 (8th ed. 2004), quoted in *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 95 n. 3 (2006). The word "action" is "nearly if not quite synonymous" with the word "suit." Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 3 (2d ed. 1899); cf. Fed. R. Civ. P. 3. The judgment bar thus establishes the preclusive effect of a judgment in one suit on another: The judgment in a suit raising FTCA claims precludes other, distinct suits against the government employee.

To read the text of Section 2676 as applying where both FTCA and *Bivens* claims are raised in the same action, the Seventh Circuit decided that the judgment in an action raising FTCA claims operates as a bar *with respect to that same action*. On this bizarre reading of the text, the judgment, "[l]ike the Ouroboros swallowing its tail," *Youngblood* v. *West Virginia*, 547 U.S. 867, 874 (2006) (Scalia, J., dissenting), operates as a bar unto itself.

The lower court tried to avoid this manifest absurdity, but only by reading Section 2676 to provide, in effect, that the judgment on a claim under the FTCA bars any claim against the government employee. App. 20a ("Once judgment is entered on the FTCA *claim*, that judgment nullifies the parallel non-FTCA

claim. . . .") (emphases added). But this interpretation of the statute is impossible to square with the statutory text, which expressly distinguishes between an "action" and a "claim," in the same sentence no less. 28 U.S.C. § 2676 (barring "any action . . . against the employee of the government whose act or omission gave rise to the claim"). Indeed, the FTCA makes the same distinction elsewhere: The very provision cited in Section 2676 provides the district courts with "exclusive jurisdiction of civil *actions on claims* against the United States." 28 U.S.C. § 1346(b)(1) (emphasis added).

A claim, unlike an action, is "[t]he aggregate of operative facts giving rise to a right enforceable by a court." *Black's Law Dictionary* 264 (8th ed. 2004). As numerous federal statutes make clear, an "action" – i.e., a lawsuit – can include many different "claims." The district courts are granted supplemental jurisdiction, for instance, "over all other claims that are so related to *claims in the action* . . . that they form part of the same case or controversy." 28 U.S.C. § 1367(a) (emphasis added). Similarly, the Federal Rules of Civil Procedure expressly allow a party to join "multiple claims . . . in a single action. Fed. R. Civ. P. 18(a). Rule 54(b), in turn, addresses how judgments are entered "[w]hen more than one claim for relief" is presented in an action, providing that "any order . . . which adjudicates fewer than all the claims . . . does not end the action." *Id.*

This Court has likewise endorsed the distinction between an "action" and a "claim." In *Exxon Mobil Corp.* v. *Allapattah Serv.*, the Court rejected the view "that a district court lacks original jurisdiction over a civil action unless the court has original jurisdiction over every

claim in the complaint." 545 U.S. 546, 560 (2005). It instead reaffirmed its reasoning in *City of Chicago* v. *Int'l College of Surgeons*, 522 U.S. 156 (1997), that "a district court has original jurisdiction of a civil action for purposes of § 1441 (a) as long as it has original jurisdiction over a subset of the *claims constituting the action*." 545 U.S. at 563 (emphasis added).

Given this clear distinction between an "action" and a "claim," Section 2676 cannot properly be interpreted to provide that judgment on an FTCA claim bars a *Bivens* claim. Because the statute cannot sensibly be read to mean that judgment in an action raising an FTCA claim somehow bars itself, the only proper reading is that Section 2676 applies only to bar *Bivens* claims raised in a separate, subsequent action.[2]

* * *

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[2] Indeed, the statute appears to assume that FTCA claims will always be raised separately from other actions. This assumption is consistent with the fact that, when the FTCA was adopted, it was widely believed that plaintiffs could not join any party other than the government as a defendant in an action raising FTCA claims. See, e.g., *Drummond* v. *United States*, 78 F. Supp. 730, 730 (E.D. Va. 1948) (holding that the FTCA does not "permi[t] a plaintiff in such an action to join a co-defendant with the United States without the latter's consent"); *Donovan* v. *McKenna*, 80 F. Supp. 690, 690 (D. Mass. 1948) (same); Note, Federal Tort Claims Act, 56 Yale LJ. 534, 544-45 (1947) (same); see also Sciaraffa, 24 Am. J. Crim. L at 165 & nn.104-07 (discussing early cases and legislative history indicating that joinder was impermissible and procedurally impractical). It is now clear that a plaintiff may combine both FTCA claims and claims against individual government employees in a single action. See, e.g., *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 555-56 (1951).

In the end, numerous factors favor this Court's review. The Circuit courts are deeply split on the question. The issue is important because it affects every *Bivens* and FTCA plaintiff, a number of whom are *pro se*. The issue will continue to recur until this Court intervenes. And this case provides an ideal vehicle to address the issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 25, 2009

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED OCTOBER 6, 2008

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 07-1120, 07-1427

STEVEN MANNING,

Plaintiff-Appellant, Cross-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee,

and

ROBERT BUCHAN and GARY MILLER,

Defendants-Appellees, Cross-Appellants.

Argued May 14, 2008
Decided October 6, 2008

Before BAUER, FLAUM and MANION, Circuit Judges.

BAUER, Circuit Judge.

If a federal law enforcement officer commits a tort, the victim has two distinct avenues of relief: he may pursue a constitutional tort claim against the individual officer under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct.

1999, 29 L.Ed.2d 619 (1971), or he may pursue a common law tort claim against the United States pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-80. The latter avenue is subject to an important caveat. Under 28 U.S.C. § 2676, a judgment in an FTCA action acts as a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Steven Manning pursued both avenues of relief in this case. His *Bivens* claims against two FBI agents succeeded, but his FTCA claim against the United States failed. The district court, finding that the FTCA judgment bar applied, vacated Manning's favorable judgment on his *Bivens* claims. Manning appealed. Because we agree that the FTCA judgment barred Manning's *Bivens* claims against the agents, we affirm.

I. BACKGROUND

Steven Manning, a former Chicago police officer and FBI informant, was convicted of kidnapping in Missouri and murder in Illinois. He received a life sentence for the kidnapping charge and a death sentence for the murder charge. Both convictions were overturned. The Illinois Supreme Court reversed his murder conviction, *People v. Manning*, 182 Ill.2d 193, 695 N.E.2d 423, 230 Ill.Dec. 933 (1998), and the Eighth Circuit granted habeas relief on the kidnapping conviction, *Manning v. Bowersox*, 310 F.3d 571 (8th Cir.2002). Manning has not been retried in either case.

Appendix A

Manning filed suit against FBI agents Robert Buchan and Gary Miller, alleging that their conduct in the investigation and prosecution of the Missouri and Illinois cases violated his rights. He sought relief under *Bivens* and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c). In the same action, he filed suit against the United States under the FTCA for common law torts of malicious prosecution and intentional infliction of emotional distress. Prior to discovery, Buchan and Miller moved for summary judgment based on absolute and/or qualified immunity. The district court denied these motions, and we affirmed. *Manning v. Miller*, 355 F.3d 1028 (7th Cir.2004). The case returned to the district court for discovery and trial.

The two claims were tried together in a combined, though bifurcated, trial. Claims under the FTCA may not be tried to a jury, 28 U.S.C. § 2402, so district court judges often bifurcate trials where FTCA claims are joined with other claims. The district court in this case followed that procedure: the claims against Buchan and Miller were tried before a jury, and the claims against the government were tried simultaneously before the court.

On January 24, 2005, a jury found for Manning on his *Bivens* claims, awarding over $6.5 million in damages against the two agents. The jury made specific findings that one or both of the agents fabricated or caused to be fabricated certain material evidence, and then concealed this and other material matters from Manning

and the prosecutors who handled the cases. The jury found for the agents on the RICO claims.

On March 23, 2005, Manning moved to have judgment entered on the jury's verdict in the *Bivens* claims. Manning noted in the motion that, even though the FTCA claim was still pending before the court, a simultaneous entry of judgments on the FTCA claim and the *Bivens* claims might trigger the FTCA judgment bar. Defendants did not object to the motion. On March 25, 2005, the district court ordered the clerk to enter judgment in favor of Manning on the *Bivens* claims.[1]

On September 26, 2006, the district court found in favor of the United States on Manning's FTCA claims. The court concluded that excluding the evidence fabricated by the FBI agents, probable cause still existed to prosecute Manning for both the kidnapping and the murder, thereby defeating the malicious prosecution claim. The court also found that Manning failed to meet his burden of persuasion on the intentional infliction of emotional distress claim. Following this ruling, the agents moved to vacate the judgment against them under Federal Rule of Civil Procedure 59(e), claiming that the FTCA judgment bar compelled vacatur of the

1. In an odd twist—ultimately without any impact on this case—the clerk apparently did not follow the court's order and failed to enter the judgment on the jury's verdict until *after* it entered the judgment on the FTCA claim. We subsequently granted the district court leave to correct this clerical error, and the district court entered judgment on the jury's verdict *nunc pro tunc* to March 25, 2005.

prior judgment in the *Bivens* claims. The district court granted the motion and vacated the judgment against Buchan and Miller. This timely appeal followed.

II. ANALYSIS

Manning argues on appeal that the district court improperly interpreted § 2676 to nullify the jury's verdict on the *Bivens* claim. The FBI agents filed a conditional cross-appeal of the adverse jury verdict, arguing that, in the event that we reversed the district court's ruling on the judgment bar, the agents were entitled to judgment as a matter of law, as well as absolute or qualified immunity. We review questions of law, such as issues of statutory interpretation, *de novo*. *Samuel C. Johnson 1988 Trust v. Bayfield County, Wis.*, 520 F.3d 822, 828 (7th Cir.2008).

Our inquiry focuses on the FTCA judgment bar, which provides:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2676. Manning concedes that the district court entered a "judgment" on the merits of his FTCA claim. He also does not dispute that the FTCA and *Bivens* claims were "of the same subject matter," which

courts have read to mean "arising out of the same actions, transactions, or occurrences." *See Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858 (10th Cir.2005) (citing *Serra v. Pichardo*, 786 F.2d 237, 239-40 (6th Cir.1986)). Rather, he argues that the judgment bar should not apply to claims raised in the *same* action, and, alternatively, that the judgment bar should not apply retroactively to nullify a *previous Bivens* judgment.

We have had limited occasion to address the interplay between the FTCA judgment bar and claims under *Bivens*. In *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180 (7th Cir.1996), a case relied upon by both parties, we determined that § 2676 applied to both favorable and unfavorable judgments on FTCA claims. Following the Ninth Circuit's rationale in *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir.1994), we observed that "[p]laintiffs contemplating both a *Bivens* claim and an FTCA claim will be encouraged to pursue their claims concurrently in the same action, instead of in separate actions." *Hoosier Bancorp*, 90 F.3d at 185 (internal quotations omitted). We did not, in that case, expressly address either argument raised by Manning here.

A. Application of § 2676 to Claims in Same Suit

Manning argues the FTCA judgment bar should not apply to claims brought in the same suit, contending that neither the language of the statute nor the congressional intent allows the construction relied upon

by the district court, and that the construction would contradict Supreme Court and our precedent.

Manning first points to the text of § 2676, which bars other "actions," but not claims within the same action. By stating that "[t]he judgment *in an action* under [the FTCA] shall constitute a complete bar to *any action* by the claimant," Manning posits that § 2676 bars all other "actions"—i.e., other lawsuits—but not claims within the same suit.

We decline to accept the interpretation of § 2676 offered by Manning. Courts must apply a statute as written when the language is plain and unambiguous. *See Dodd v. United States*, 545 U.S. 353, 359, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000)) (internal quotation marks omitted)). Section 2676 provides that an FTCA judgment acts as a bar to "any action." Under the plain meaning of that term, this must be read to include claims brought within the same action, as a claim is necessarily part of an action. Thus when the district court in this case entered a judgment in the FTCA claim, that judgment became a "judgment in an action under" the FTCA which "constitute[d] a complete bar to any action by the claimant," and Manning's *Bivens* claims fell under the ambit of "any action."

The common usage of the term "action" supports this reading, as "action" incorporates all elements of a civil suit, including the claims within that suit. *See* Black's Law Dictionary 31 (8th ed.2004) (defining "action" as "[a] civil or criminal judicial proceeding" and equating it with "action at law," defined as a "[a] civil suit stating a legal cause of action and seeking only a legal remedy"); *Gillespie v. Equifax Information Services, L.L.C.*, 484 F.3d 938, 941 (7th Cir.2007) ("We frequently look to dictionaries to determine the plain meaning of words."). Manning's *Bivens* claims existed as part of a "civil judicial proceeding" at the time that the court entered judgment on the FTCA claim. By acting as a bar to *any* action, § 2676 bars the claims *within* that action. This reading of the meaning of the term "action" also makes sense within the context of the entire statute. Though Congress could have been more explicit in indicating the application of § 2676 to claims in the same suit as the FTCA claim, the choice of broad language—"a *complete* bar to *any* action"—makes clear that the bar was intended to apply to such claims. *See Serra*, 786 F.2d at 239.

Manning's interpretation of § 2676 strains the plain language of the statute by suggesting that the term "action" does not include the claims within that action. A claim is a part of the broader term action, and we do not see how the judgment bar could be read to preclude the whole while preserving its parts. An interpretation that § 2676 was intended to bar only subsequent lawsuits by the same party arising out of the same set of facts does not find adequate support in the text.

No court has interpreted § 2676 in the manner put forth by Manning; to the contrary, courts have consistently found that an FTCA judgment bars a *Bivens* claim raised in the same suit. *See Harris v. United States*, 422 F.3d 322 (6th Cir.2005); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840 (10th Cir.2005); *Engle v. Mecke*, 24 F.3d 133 (10th Cir.1994); *Arevalo v. Woods*, 811 F.2d 487 (9th Cir.1987); *Serra*, 786 F.2d at 241; *see also Clifton v. Miller*, 139 F.3d 901 (7th Cir.1998) (unpublished opinion); *Ortiz v. Pearson*, 88 F.Supp.2d 151, 167 (S.D.N.Y.2000). Like these courts, we find that "it is inconsequential that the [*Bivens* and FTCA] claims were tried together in the same suit." *Serra*, 786 F.2d at 241.

Manning complains that to hold that the judgment bar applied in this case would contradict our ruling in *Hoosier Bancorp*, where, Manning argues, we instructed plaintiffs to bring both claims simultaneously in the same lawsuit. Manning overstates our directive. In *Hoosier Bancorp*, we encouraged plaintiffs with claims under *Bivens* and the FTCA to pursue those claims concurrently in the same suit. 90 F.3d at 185. We never stated that plaintiffs with both claims must pursue both claims to judgment in order to recover any damages; more to the point, we never stated that a plaintiff could keep both a *Bivens* and an FTCA judgment, or that the FTCA judgment bar would not apply to actions such as this. Plaintiffs like Manning who choose to pursue both avenues of relief must assume the risk that a *Bivens* judgment would be nullified by § 2676. We will not undo what amounts to the inevitable result of a strategic choice by Manning.

Manning further argues that this result either forecloses *Bivens* or renders it superfluous. The Supreme Court in *Carlson v. Green* stated that it is "crystal clear that Congress views FTCA and Bivens as parallel, complementary causes of action." 446 U.S. 14, 19-20, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). Reading the statute to bar claims in the same suit would eviscerate the Bivens action against protection of these claims in Carlson, according to Manning. We disagree. A plaintiff may still bring both parallel claims as remedies to torts committed by law enforcement officers against the government and the individual officers, and the remedies complement each other. But the idea that a plaintiff may bring claims against both the government and the federal officer does not directly implicate whether one may pursue those claims to judgment. Both remedies remain as viable causes of action, but because of the broad language of the judgment bar, plaintiffs must make strategic choices in pursuing the remedies. We do not think it unreasonable to require a plaintiff that moved for judgment on a successful Bivens claim to decide whether or not it makes sense to voluntarily withdraw a contemporaneous FTCA claim. *See, e.g.*, *Engle*, 24 F.3d at 134; *Ortiz*, 88 F.Supp.2d at 167. Such a requirement does not run afoul of Carlson or *Hoosier Bancorp.*

Manning also relies on the Supreme Court's ruling in *Will v. Hallock*, 546 U.S. 345, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006), arguing that the case supports his reading of § 2676 and supercedes all of the cases cited above. In *Will*, the Court addressed whether a district

court's decision to refuse to apply the judgment bar of § 2676 was open to collateral appeal. The Court found that a statutory bar to litigation did not necessarily constitute the kind of immunity from suit that justifies an interlocutory appeal under the collateral order doctrine. In so doing, the Court observed that the FTCA judgment bar had an "essential procedural element" which set it apart from other forms of immunity; namely, that the judgment bar would not take effect until the after the district court entered an FTCA judgment. This element distinguished it from other forms of immunity from suit (such as qualified immunity), which are timely from the moment the complaint is served, and therefore warrant collateral review. The Court explained:

> If a *Bivens* action alone is brought, there will be no possibility of a judgment bar, nor will there be so long as a *Bivens* action against officials and a Tort Claims Act against the Government are pending simultaneously (as they were for a time here). In the present case, if [the plaintiff] had brought her *Bivens* action and no other, the agents could not possibly have invoked the judgment bar in claiming a right to be free of trial.

Id. at 354, 546 U.S. 345, 126 S.Ct. 952, 163 L.Ed.2d 836. This procedural element likens the § 2676 bar to res judicata, the Court noted, which, except in the rare case, did not warrant collateral review. Therefore "[a]lthough the statutory judgment bar is arguably broader than

traditional res judicata," like res judicata, the statute does not "protect values so great that only immediate appeal can effectively vindicate them." *Id.* at 354-55, 546 U.S. 345, 126 S.Ct. 952, 163 L.Ed.2d 836.

Manning first extrapolates from this analysis that Congress incorporated principles of res judicata into § 2676, which, according to Manning, would indicate an intention that the bar not apply to multiple claims within a single suit. He contends that like the judgment bar, the purpose of res judicata is to avoid multiple lawsuits, a concern which is not implicated when plaintiffs bring all claims in a single action. Manning supports his argument by noting the use of the term "bar," which constitutes a component of res judicata, and the legislative history of § 2676.

Regardless of whether the point has relevance to our inquiry, Congress did not import common law res judicata into § 2676. As to the discussion in *Will*, Manning's argument draws too much from the Court's comparative point. Rather than suggesting that § 2676 imported principles of res judicata, the Court merely observed that the judgment bar was *akin* to res judicata in that a decision based on either did not warrant collateral review. The judgment bar—which is "arguably broader than traditional res judicata"—stands on its own. Additionally, we find little in the use of the term "bar" to support Manning's argument. The use of the term "bar" is not confined to the principle of res judicata; we refer without reference to the principle to statutes of limitation "bars" or jurisdictional "bars."

We also find little support for Manning's argument in the legislative history of § 2676. Because § 2676 is not ambiguous, we need not look to the legislative history to determine its meaning. *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). But assuming *arguendo* that the proposed reading is texturally plausible, the legislative history does not alter our view of the best interpretation of § 2676. The legislative history relied upon by Manning—a statement by the Attorney General before the House Judiciary Committee—neither mentions res judicata nor limits the scope of the judgment bar to exclude cases such as Manning's.

Finally, in his reply brief, Manning culls another argument from the language in *Will*. He contends that according to the portion of the opinion quoted above, the judgment bar "does not apply when FTCA and *Bivens* claims are pending simultaneously." Because his two claims were "pending simultaneously" in the same case, the argument goes, the judgment bar should not apply. That is not the holding of *Will*, and the "pending simultaneously" language from *Will* is taken out of context. In analyzing the "essential procedural element" of § 2676, the Court noted that the judgment bar does not take effect until a judgment is entered. As long as the FTCA claim is "pending"—i.e., not taken to judgment—the bar has no effect. That "procedural" element distinguishes it from qualified immunity, and renders it unfit for collateral review. That discussion has no bearing on the case before us, Manning's efforts to force the language notwithstanding.

B. Application of § 2676 to Previously Entered Judgments

Manning alternatively argues that even if the judgment bar applies when FTCA and *Bivens* claims are brought in the same action, it should not be read to allow retroactive nullification of a previous *Bivens* judgment.

Again, we begin with the language of the statute, which we find unambiguous. Manning argues that the use of the term "bar" precludes only future litigation, not litigation that has previously proceeded to judgment. We disagree. Nothing about the term "bar" on its own indicates a temporal element. The "complete bar" as used in § 2676 is prospective only in that it enters into effect after an entry of judgment in the FTCA claim; but there is nothing in the text restricting that effect to future claims. The common use of the noun "bar" supports this reading. *See* Black's Law Dictionary 157-58 (8th Ed.2004) (defining "bar" as a "barrier to or the destruction of a legal action or claim"). So too does the remaining text of the statute. Section § 2676 applies to "any action"; "any" means "any," regardless of the sequencing of the judgments.

Few courts have addressed this issue, primarily because in the overwhelming number of cases where FTCA and *Bivens* claims are brought in the same suit, a district court will enter judgment on the FTCA claim either before or simultaneously with the *Bivens* judgment. In *Trentadue*, our sister circuit found that §

2676 applied to retroactively bar a *Bivens* judgment entered prior to a FTCA judgment. 397 F.3d at 859. In that case, as here, the district court tried plaintiffs' FTCA and *Bivens* claims contemporaneously in a bifurcated proceeding. A jury found for the plaintiffs on the *Bivens* claims, and the district court entered a judgment. Several months later, the court entered a judgment on the FTCA claims. The court then dismissed the *Bivens* claims, finding that § 2676 applied. The court found that the sequencing of the judgments was irrelevant to the judgment bar's effect. In doing so, it relied on the intent of § 2676, which "prevent[s] multiple lawsuits as well as multiple recoveries." *Id.* (citing *Farmer v. Perrill*, 275 F.3d 958, 963 n. 7 (10th Cir.2001)).

Other courts have approved of the proposition that a judgment on an FTCA claim requires vacatur of an earlier judgment on a *Bivens* claim. *See Engle*, 24 F.3d at 135 ("Had [plaintiff] chosen to seek his redress from the individual law enforcement officer, the jury verdict would have been given full effect. . . . Because, however, he chose to seek redress from the United States government, he had no right to a jury's verdict."); *McCabe v. Macaulay*, 2008 WL 2980013, at *14 (N.D.Iowa August 01, 2008) (citing *Trentadue*, 397 F.3d at 859) ("[I]t is 'inconsequential' that the court entered judgment [in the *Bivens* action] before it entered judgment against the United States; the judgment bar may operate retroactively."); *see also Ortiz*, 88 F.Supp.2d at 167 (citing *Engle*, 24 F.3d at 134-36 and *Serra*, 786 F.2d at 241-42) (noting that if a plaintiff brings both claims in the same action, and succeeds on the *Bivens*

action first, "[a] decision to then proceed on the FTCA claim might jeopardize any favorable verdict plaintiff received on his *Bivens* claim since . . . a decision and judgment on the FTCA claim is likely to nullify any *Bivens* judgment").

We agree with the reasoning of these cases. The fact that the court entered judgment against the FBI agents before it entered judgment in favor of the United States has no bearing on the application of § 2676.

Manning's reliance on *Kreines v. United States*, 959 F.2d 834 (9th Cir.1992), is misplaced. There, the plaintiff brought *Bivens* and FTCA claims in the same suit. The jury found for the plaintiff on the *Bivens* claim, and the court entered a judgment. Three months later, the district court entered a judgment in favor of the United States in the FTCA claim. The court then denied a motion by the defendants of the *Bivens* claim to vacate the judgment against them. The Ninth Circuit affirmed, finding an ambiguity within the plain language of the term "judgment" in § 2676 that allowed an interpretation that Congress intended to distinguish between favorable and unfavorable merits judgments. The judgment bar would apply, according to the *Kreines* court, if an FTCA judgment were in favor of the plaintiff, but not if the judgment were in favor of the government. Accordingly, § 2676 did not apply.

As noted above, we have rejected the underlying reasoning in *Kreines*, and therefore do not attach much significance to its outcome. *Hoosier Bancorp*, 90 F.3d

at 185 ("There is no indication that Congress intended Section 2676 to apply only to favorable FTCA judgments."). Other courts have also repudiated the reasoning of *Kreines*. *See Harris*, 422 F.3d at 335; *see also Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir.1994) (noting that "the holding in *Kreines* was narrowly confined to its facts"). Thus while Manning may find appealing the result of *Kreines*, the reasoning supporting that result does not avail him.

Many of Manning's remaining arguments are equitable in nature, suggesting that he was blindsided by the court's decision or that he was unwittingly led into a poor strategic choice. The record belies these arguments. During the course of the proceedings below, Manning acknowledged an awareness of the risk that a judgment on the FTCA claim would nullify the *Bivens* judgment. In his motion to enter judgment on the jury's verdict on the *Bivens* claim—filed before the entry of the FTCA judgment—Manning noted the possibility that entering judgment might bar his *Bivens* claim, as some courts "believe that judgment on the FTCA claim is 'likely to nullify any *Bivens* judgment.' " As the district court noted, Manning "was aware that by allowing the FTCA claims to proceed to judgment, he risked losing the jury award, by operation of law, once the Court entered judgment on the FTCA claims."

III. CONCLUSION

We are not blind to the fact that this interpretation of § 2676 results in a significant reversal of fortune for Manning. Manning condemns this result as "nonsensical"; at least one court has identified such a result as "harsh." *See McCabe*, 2008 WL 2980013, at *15 ("Although such retroactive operation of § 2676 may seem harsh, if not Kafka-esque, Plaintiffs pursued their claims against the United States at their own peril."). But we are bound by the plain language of the judgment bar, which makes no exception for claims brought in the same action, and gives no indication that the sequencing of judgments should control the application of the bar.

Manning's decision to take the FTCA claims to judgment, after he had secured a $6.5 million verdict on the *Bivens* claims, triggered § 2676 and required a vacatur of the *Bivens* judgment. The district court did not err in applying the judgment bar. Because we find that § 2676 applies, we need not reach the conditional cross-appeal. Accordingly, we AFFIRM.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED DECEMBER 26, 2006

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 C 372

STEVEN MANNING,

Plaintiff,

v.

GARY MILLER, ROBERT BUCHAN, and UNITED STATES OF AMERICA,

Defendants.

December 26, 2006

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge.

Steven Manning filed a suit against two Federal Bureau of Investigation agents for violating his constitutional rights and against the United States under the Federal Tort Claims Act for common law torts. All of these claims arose from the same subject matter. The claims were tried together—the claims against the agents to a jury, and the FTCA claims to the Court. The

jury found in Manning's favor and awarded him over $6,500,000 in damages against the agents. The Court took the FTCA claims under advisement. Manning did not withdraw the FTCA claims even though he was aware that by allowing the FTCA claims to proceed to judgment, he risked losing the jury award, by operation of law, once the Court entered judgment on the FTCA claims.

The Court ultimately found against Manning on the FTCA claims and entered a judgment in the government's favor on those claims. The FBI agents have now moved to vacate the judgment against them. The Court concludes that the statute upon which the agents rely, 28 U. S .C. § 2676, has the effect of requiring a plaintiff who brings both FTCA and non-FTCA claims arising from the same subject matter to choose his remedy before the FTCA claim proceeds to judgment. Once judgment is entered on the FTCA claim, that judgment nullifies the parallel non-FTCA claim, even if it had previously proceeded to judgment. Manning made his choice when he allowed the FTCA claim-which provides greater certainty in collecting an award-to proceed to judgment. He cannot now avoid the consequences of that choice.

For the reasons stated below, the Court grants the FBI agents' motion and vacates the judgment against them.

Appendix B

Background

Following investigations conducted by the Federal Bureau of Investigation, the Buffalo Grove Police Department, and other authorities, Manning was convicted of kidnapping in Missouri, where he received a sentence of life in prison, and of murder in Illinois, where he received a death sentence. His convictions were ultimately overturned, and the authorities elected not to retry him on either charge.

Manning filed suit against two FBI agents, Robert Buchan and Gary Miller, and against the United States, seeking to recover damages arising from his allegedly wrongful prosecution and imprisonment. Manning sought to recover damages against Buchan and Miller under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violating his constitutional rights in connection with the Missouri and Illinois prosecutions, and under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c). Manning sought to recover damages against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1) & 2674, for malicious prosecution and intentional infliction of emotional distress. All of Manning's claims arose from the same set of facts, specifically, actions taken by Buchan and Miller and others allegedly acting in concert with them during the investigation and prosecution of the Missouri and Illinois cases.

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The Court conducted a simultaneous, though bifurcated, trial of Manning's claims against Buchan and Miller-as to which Manning had demanded a jury trial-and his FTCA claims, on which there is no right to a jury trial. On January 24, 2005, a jury found in Manning's favor on his *Bivens* claims against the FBI agents and awarded him over $6,500,000 in damages; the jury found in Buchan and Miller's favor on the RICO claims.

At the conclusion of the trial, the Court took Manning's FTCA claims under advisement. On March 23, 2005, Manning asked the Court to enter a judgment on the jury's verdict relating to the *Bivens* claims. *See* Pl.'s Mot. for Entry of Judgment on the Jury's Verdict (docket no. 223). In the motion, Manning argued that there was no good reason not to enter a judgment on that verdict, and three good reasons to enter a judgment. First, Manning argued,

> there is at least some question as to whether a judgment on the FTCA claim entered simultaneously with the *Bivens* verdict would trigger the FTCA's judgment bar. *See* 28 U.S.C. § 2676. Although the law is split on the question, some courts have held that this bar does not come into play if the *Bivens* judgment is entered first. Other courts, however, seem [to] believe that judgment on the FTCA claim is "likely to nullify any *Bivens* judgment." Still other courts have required the plaintiff to choose his preferred judgment.

Id. at 2 (citations omitted). The Court notes that in this argument, Manning specifically acknowledged his

awareness of the risk that a judgment on the FTCA claim would nullify the Bivens judgment. Second, Manning argued, entering a judgment against Buchan and Miller on the Bivens claims might start the process under which they could seek indemnification from the government for the damage award against them. *Id.* Third, Manning argued, entering a judgment would allow post-judgment interest to begin accruing.

The government interposed no objection to Manning's motion, so on March 25, 2005, the Court entered an order which directed the Clerk

> to enter judgment as follows: On Count 1 (Illinois murder case), judgment is entered in favor of plaintiff and against defendants Buchan and Miller. [On] Count 7 (Missouri kidnapping case), judgment is entered in favor of plaintiff and against defendant Buchan, and in favor of defendant Miller. Compensatory damages are awarded in the amount of $3,851,100 on Count 1 and $2,555,000 on Count [7], and punitive damages are awarded in the amount of $100,000 against defendant Buchan and $75,000 against Miller.

Order of Mar. 25, 2005 (docket no. 225). The Clerk evidently did not actually enter a judgment as directed; at least, none appears on the docket. That is, however, a clerical error that, if necessary, could be corrected by ordering, *nunc pro tunc*, entry of a judgment on the *Bivens* claims.

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In July 2005, the Court granted a motion by the government to reopen the evidence regarding a fairly narrow point on the FTCA claims. This ruling necessitated further discovery and a brief evidentiary submission that took place in February 2006. In the interim, in November 2005, the Court upheld the jury's verdict on the *Bivens* claims against a post-trial challenge by Buchan and Miller.

In September 2006, the Court entered findings of fact and conclusions of law on the FTCA claims. The Court found in favor of the government on those claims. The Court then entered a judgment on the FTCA claims, noting that this concluded the case because it disposed of all remaining claims. *See* Order of Sept. 28, 2006 (docket no. 251); Judgment (docket no. 252).

Following the Court's decision on the FTCA claims, Buchan and Miller moved pursuant to Federal Rule of Civil Procedure 59(e) to amend the judgment to vacate the jury verdict on the *Bivens* claims. They argue that a federal statute, 28 U.S.C. § 2676, has the effect of nullifying a judgment on a *Bivens* claim when a FTCA claim arising from the same acts proceeds to judgment, even if that judgment post-dates the entry of judgment on the *Bivens* claim.

Appendix B

Discussion

The resolution of the defendants' motion turns on the meaning of 28 U.S.C. § 2676, which provides as follows:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Section 2676 has been part of the FTCA from the time it was adopted in 1948. Its chief purpose appears to be to prevent dual recovery and avoid the waste of government resources in defending repetitive suits. *See Gasho v. United States*, 39 F.3d 1420, 1437-38 (9th Cir.1994); *see also, e.g., Hallock v. Bonner*, 387 F.3d 147, 154 (2d Cir.2004), *rev'd on other grounds sub nom. Will v. Hallock*, 126 S.Ct. 952, 960 (2006). In addition, because " 'a judgment in an action against the United States under the FTCA will constitute a [judgment bar] in favor of the employee whose action gave rise to the claim,' the rule increases the likelihood 'that claims for torts [will] be made against the United States rather than, as *Bivens* suits, against the employee.' " *Hallock*, 387 F.3d at 154 (quoting *Birnbaum v. United States*, 588 F.2d 319, 333 (2d Cir.1978)). In other words, Congress evidently intended the burden of responsibility for paying damages for tortious acts by federal employees to fall on the government, rather than on employees.

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There is no question that section 2676 applies in this case. First, there has been a "judgment in an action under section 1346(b)," which refers to the FTCA. Second, though Manning's claims against Buchan and Miller involved different causes of action than his FTCA claims against the government, they involved "the same subject matter" as the FTCA claim. That statutory term has been uniformly interpreted as requiring inquiry into whether the FTCA and individual liability claims " 'aris[e] out of the same actions, transactions, or occurrences.' " *See, e.g., Estate of Trentadue v. United States*, 397 F.3d 840, 858 (10th Cir.2005) (quoting *Serra v. Pichardo*, 786 F.2d 237, 239-40 (6th Cir.1986)); *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir.1989); *Arevalo v. Woods*, 811 F.2d 487, 489-90 (9th Cir.1987). Manning's claims against Buchan and Miller arise from precisely the same actions, transactions, and occurrences as his FTCA claim against the government, specifically, the alleged misconduct of the agents in connection with the investigation and prosecution of the Missouri and Illinois cases. Manning cites no authority suggesting otherwise.

The question before the Court concerns the effect of section 2676's "complete bar to any action by reason of the same subject matter." The defendants argue that by virtue of this statute, the entry of judgment in the government's favor on the FTCA claim wipes out the earlier judgment in Manning's favor on the *Bivens* claims. Manning argues that the statute does not have this sort of retrospective effect. Alternatively, Manning asks that he be permitted now to withdraw the FTCA

claims so that he can preserve the favorable judgment on the *Bivens* claims.

The Court believes that the defendants have the better of the argument regarding the effect of section 2676. First, the statute expressly imposes a bar to *any* action, not just later actions. As such, it applies in cases like this one in which FTCA and non-FTCA claims are brought as part of the same lawsuit. *See, e.g ., Harris v. United States*, 422 F.3d 322, 334 (6th Cir.2005); *Rodriguez*, 873 F.2d at 816; *Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197, 1201 (4th Cir.1978); *United States v. Lushbough*, 200 F.2d 717, 7211 (8th Cir.1952). Manning cites no contrary authority.

Second, the bar applies even though the judgment on the FTCA claim was unfavorable to Manning. The statute is worded neutrally; its contains no hint that its effect depends on who won the FTCA claim. Every court to have spoken on this point, save one, has said that the application of the judgment bar does not depend on whether the FTCA judgment was favorable or unfavorable to the plaintiff. *See, e.g., Harris*, 422 F.3d at 334-35; *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 185 (7th Cir.1996); *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir.1994). *But see Kreines v. United States*, 959 F.2d 834, 838 (9th Cir.1992), which the Court will discuss shortly.

Manning makes several arguments against applying section 2676 to nullify the judgment on the *Bivens* claims. None of these arguments has merit.

First, Manning argues that because section 2676 provides that "the judgment in an action" operates as a bar, it indicates that Congress intended to distinguish between a "judgment" and an "action." Relying on this purported distinction, Manning contends that because the bar applies "to any *action* " against a government employee regarding the same subject matter, it does not apply to a prior *judgment*-as the two terms mean different things.

The Court rejects this argument. As the defendants point out in their reply, the common meaning of the term "action" includes all of the proceedings involved in a lawsuit. including its adjudication. *See* Black's Law Dictionary 29 (6th ed.1990) (stating that the term "includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court."). Thus when Congress said that a judgment in an FTCA case bars an "action" on a non-FTCA claim, it meant to bar such an action in its entirety, including the judgment-not just the filing, or later filing, of the non-FTCA action.

Congress' use of the term "judgment" as the trigger for the statutory bar simply denotes that the bar applies only if and when a judgment is entered on an FTCA claim. In other words, it is the determination, by judgment, of an FTCA suit that brings the statutory bar into effect, not the mere filing of such a suit. *See Will*, 126 S.Ct. at 960 ("[T]he judgment bar can be

raised only after a case under the Tort Claims Act has been resolved in the Government's favor.").

Second, Manning argues that section 2676 bars only multiple recoveries, citing excerpts from the statute's legislative history that he says support that construction-specifically, the testimony of the Assistant Attorney General before the House Judiciary Committee. These excerpts do not warrant interpreting the statute in a way that is not supported by its language. First of all, the FTCA, including section 2676, was passed by a later Congress, not the Congress whose House Judiciary Committee conducted the hearings in question. Second, the comments are those of a representative of the executive branch, not of the Congress that adopted the law. Third and perhaps most importantly, absent a statutory ambiguity–which does not exist in section 2676–it is generally inappropriate to resort to the legislative history to construe a statute. *See generally Exxon Mobil Corp. v. Allapattah Svcs., Inc.*, 545 U.S. 546, 125 S.Ct. 2611, 2626 (2005); *see also, e.g., Shannon v. United States*, 512 U.S. 573, 584 (1994); *In re Sinclair*, 870 F.2d 1340, 1341 (7th Cir.1989). Finally, as the defendants point out in their reply brief, other parts of the legislative history suggest that the "no dual recovery" point was just one of several arguments made by the Assistant Attorney General in support of the proposed enactment. Under the circumstances, even were it appropriate to consider the legislative history, it cannot be given significant weight in interpreting section 2676. *See Exxon*, 125 S.Ct. at 2626-27. The Supreme Court recently noted that "[a]s we have

repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Id.* at 2626. Such is not the case here.

It is also worth noting that despite his contention that section 2676 is aimed to prevent double recoveries, Manning *tried to get* a double recovery (as he uses that term)-namely, awards of damages against both the United States and the agents for the same underlying conduct. If he had succeeded in his quest, under Manning's "no dual recovery" interpretation of section 2676, the judgment bar would have applied to his *Bivens* claim. Thus Manning is effectively saying that because he did not succeed in his attempt to get what he contends section 2676 prevents, he should be able to avoid the statutory bar. This "heads I win, tails you lose" approach finds no support in the language of the statute.

Third, Manning argues that section 2676 operates only to prevent a plaintiff who brings a FTCA suit and takes it to judgment from pursuing a *later* non-FTCA suit against the responsible government employees. *See* Pl. Resp. at 4 ("This is what the statute actually provides, *i.e.*, where a Plaintiff obtains a judgment against the United States, he cannot turn around and bring a subsequent *Bivens* action."). If Manning were correct, then it would stand to reason that if, after he prevailed before the jury, the Court had ruled in his favor

on the FTCA claims and awarded him as much or more than the jury, he would have been able to keep both judgments–because he did not "turn around and bring a subsequent *Bivens* action." Manning's interpretation cannot be correct, for it would permit the exact thing he says section 2676 was designed to prevent: multiple recoveries.

Finally, Manning correctly points out that the vast majority of the cases concerning the effect of section 2676 involve simultaneous determination of the FTCA and non-FTCA claims or situations in which the FTCA judgment was obtained before the non-FTCA claim was determined, not cases like this one in which the non-FTCA claim was decided first. From what the Court has been able to determine, there are only two, or perhaps three, cases applying the judgment bar in cases where the non-FTCA claim was decided first. The better reasoned of these cases, however, supports the defendants' reading of section 2676.

In *Estate of Trentadue*, as in Manning's case, the plaintiff's FTCA and non-FTCA claims were tried together. The jury found in favor of the plaintiff on one of his *Bivens* claims, awarding $20,000 in damages, and a judgment was entered on that claim. Five months later, the court found in the plaintiff's favor on his FTCA claim, awarding $1.1 million. *Estate of Trentadue*, 397 F.3d at 851. The defendant named in the *Bivens* claim argued that the entry of judgment on the FTCA claim required vacating the judgment against him on the *Bivens* claim. The court agreed, concluding that the

claims involved the same subject matter and that "the fact that the district court entered judgment on the *Bivens* matter before issuing its order and judgment in the FTCA case is inconsequential under § 2676." *Id.* at 859. According to the court, "[a] contrary rule would permit plaintiffs to escape the judgment bar's preclusive effect in cases like this, where the district court waited to enter judgment on FTCA claims tried contemporaneously with *Bivens* claims. Such is not the intent of the rule." *Id.*

The discussion in *Estate of Trentadue*, if applicable here, clearly requires the relief sought by Buchan and Miller. Manning argues that the two cases are not similar, because the FTCA judgment in *Estate of Trentadue* was more favorable to the plaintiff than the *Bivens* judgment. That, however, does not matter. As the Court has discussed, and as the Seventh Circuit has stated, application of the FTCA judgment bar does not depend on who won or who lost on the FTCA claim.

Manning relies heavily on a Ninth Circuit case which is close to being "on all fours" with the present case. In *Kreines v. United States*, 959 F.2d 834 (9th Cir.1992), the plaintiff filed a suit including both *Bivens* and FTCA claims, which were tried jointly. The jury returned a verdict for the plaintiff on the *Bivens* claims and awarded $7,000; the trial court entered judgment on those claims. About three months later, the court found for the government on the plaintiff's FTCA claim. The trial court denied the individual defendants' motion under section 2676 to vacate the *Bivens* judgment, and they appealed.

On appeal, the Ninth Circuit looked to the legislative history of section 2676 and concluded that Congress' primary concern in adopting the statute "was to prevent multiple lawsuits on the same facts." That, the court said, is not a concern when FTCA and non-FTCA claims are asserted in a single suit. *Id.* at 838. The court also said that although another purpose of section 2676 was to preclude dual recovery, there was no threat of that happening in Kreines' case, as she had not prevailed on her FTCA claims. *Id.* The court went on to say that because section 2676 provides that an FTCA judgment "bars an *action*," it is ambiguous on whether a FTCA judgment in the government's favor bars a contemporaneous *Bivens* judgment in the plaintiff's favor. For this reason, the court said, it was "free ... to consider the possibility that the *quality* of the FTCA judgment"–in other words, who won–might have a bearing on its effect on a contemporaneous *Bivens* judgment. *Id.* It concluded that because the statute's primary purpose was "to prevent dual recoveries arising from additional, subsequent litigation . . . § 2676 does not preclude *Bivens* relief in this case." *Id.*

This Court disagrees with *Kreines*. First, the court's decision appears to be premised on the proposition that section 2676 is ambiguous. Specifically, the Ninth Circuit said, the statute's imposition of a bar "to any action" against a government employee "fails to resolve the question whether the bar applies to other claims raised in the same action." *Kreines*, 959 F.2d at 838. The Court does not agree. "Any" means any; the statute does not suggest there are exceptions. In any event, Manning does not argue that section 2676 is ambiguous.

Second, the Ninth Circuit's determination that section 2676's application depends on who wins on the FTCA claim is at odds with the statute's language, which makes no such distinction. The statute says that a judgment in an FTCA action bars an action against a federal employee on the same subject matter, not that an employee can obtain only one recovery. If it were appropriate to read section 2676 as meaning only that dual recoveries are barred, then it would permit a plaintiff who sued under the FTCA and lost to then sue the responsible federal employee under non-FTCA law-as the plaintiff would not be seeking a double recovery. Allowing that, however, would be contrary to the statute's plain language.

Third, as discussed earlier, it is firmly established that section 2676 bars a non-FTCA claim that it determined simultaneously with an FTCA claim. Though that did not happen in *Kreines* or in the present case, it makes no sense to have the effect of section 2676 turn on how promptly the trial judge decides the FTCA claim when FTCA and non-FTCA claims are tried together. *See Estate of Trentadue*, 397 F.3d at 859. The application of section 2676 should not turn on such fortuities.

There is a third similar case that, although it does not expressly address how section 2676 applies in the present situation, points in the same direction as *Estate of Trentadue*. In *Engle v. Mecke*, 24 F.3d 133 (10th Cir.1994), the plaintiff brought both *Bivens* and FTCA claims in a single case. The jury awarded the plaintiff approximately $351,000 on his *Bivens* claim against a

federal security guard. But "[b]ecause he anticipated difficulties in collecting this award . . . , Mr. Engle elected to proceed against the federal government on his tort action." *Id.* at 134. Based on the same evidence presented to the jury, the trial court also found for the plaintiff, but awarded only about $28,000. The trial judge then vacated the jury verdict against the officer based on section 2676. *Id.* at 134-35. The appeal concerned whether the trial judge was bound, under the Seventh Amendment, by the jury's determination regarding the amount of damage the plaintiff had suffered. The Tenth Circuit concluded that because the plaintiff did not have the right to a jury trial on the FTCA claim, the trial judge did not err in making an independent judgment of the plaintiff's damages. *Id.* at 135. That question, of course, did not directly concern the effect of section 2676. But before addressing the Seventh Amendment argument, the court pointed out that because of section 2676, "[a] decision to sue the government . . . affects the availability of a *Bivens* action against the federal officer." *Id.* Thus *Engle*-at least implicitly and perhaps more than implicitly-approves the proposition that a later, less favorable judgment on a FTCA claim requires vacating an earlier, more-favorable non-FTCA judgment. That is the situation in Manning's case.

In sum, section 2676's judgment bar applies to a non-FTCA claim brought as part of the same action as an FTCA claim, and it applies irrespective of whether the FTCA judgment was favorable to the plaintiff. For these reasons, the consequence of Manning's decision to take the FTCA claims to judgment is that the FTCA

judgment against him bars his *Bivens* claims and requires vacating the judgment on those claims. As the Fifth Circuit stated in *Rodriguez*, "by the clear language of § 2676, the price of obtaining an FTCA judgment against the United States based on a given incident is the loss of all claims arising from that incident against the United States' agents." *Rodriguez*, 873 F.2d at 816.

Manning asks in the alternative that the Court permit him now to withdraw the FTCA claims and then vacate the judgment against him on those claims, leaving intact the judgment on the *Bivens* claims. He has provided no support for this request. As discussed earlier, Manning and his counsel were fully aware of the potential consequences of allowing the FTCA claims to proceed to judgment after obtaining the favorable jury verdict on the *Bivens* claims. They nonetheless decided to allow the Court to decide the FTCA claims.

Relief from a judgment is an extraordinary remedy granted only in exceptional circumstances. *See, e.g., Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir.2006). Manning has cited no provision of Federal Rule of Civil Procedure 60(b), and no other legal authority, allowing him to, in effect, undo a strategic choice because it turned out to be the wrong choice. As the Seventh Circuit has stated, " 'when a party makes a deliberate, strategic choice . . . , she cannot be relieved of such a choice merely because her assessment of the consequences was incorrect.' " *McCormick v. City of Chicago*, 230 F.3d 319, 327 (7th Cir.2000) (quoting *United States v. Bank of New York*, 14 F.3d 756, 759 (2d Cir.1994)).

If Manning had asked to withdraw his FTCA claims following the favorable judgment on the *Bivens* claims and before the Court decided the FTCA claims, the Court likely would have allowed him to do so, and as a result he would have avoided section 2676's judgment bar. But Manning did not follow that course. Presumably he acted as he did because he believed the risk of losing his *Bivens* judgment was outweighed by other factors. But whatever the reason, the choice was a strategic decision which cannot now be undone.

Conclusion[1]

For the reasons stated above, the Court grants the motion of defendants Buchan and Miller to alter or amend the judgment [docket no. 257]. The judgment against defendants Buchan and Miller on Counts 1 and 7 (the *Bivens* claims) is vacated.

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1. The Court has considered Manning's other arguments and has determined them to be without merit.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 26, 2009

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 26, 2009

Before

William J. Bauer, *Circuit Judge*

Joel M. Flaum, *Circuit Judge*

Daniel A. Manion, *Circuit Judge*

Nos. 07-1120 and 07-1427

STEVEN MANNING,

Plaintiff-Appellant, Cross-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee,

and

ROBERT BUCHAN and GARY MILLER,

Defendants-Appellees, Cross-Appellants.

Appendix C

ORDER

On October 20, 2008, plaintiff-appellant/cross-appellee filed a petition for rehearing *en banc* in connection with the above-referenced case. On November 13, 2008, defendants-appellees filed an answer to appellant's petition for rehearing *en banc*. No judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that the petition for rehearing and rehearing *en banc* is DENIED.

(3)

No. 08-1595

In the Supreme Court of the United States

STEVEN MANNING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA) provides that the judgment in an action under the jurisdictional provision of the FTCA, 28 U.S.C. 1346(b), "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. The question presented is whether, under Section 2676, a judgment on FTCA claims bars a judgment on *Bivens* claims when the FTCA claims and the *Bivens* claims were brought together in the same lawsuit.

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In the Supreme Court of the United States

No. 08-1595

STEVEN MANNING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 546 F.3d 430. The opinion of the district court (Pet. App. 19a-37a) is unreported but is available at 2006 WL 3825043.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2008. A petition for rehearing was denied on January 26, 2009 (Pet. App. 38a-39a). On April 20, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including June 25, 2009, and the petition was filed on June 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, provides a limited waiver of sovereign immunity for claims against the federal government based on "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b)(1); *Dalehite* v. *United States*, 346 U.S. 15, 17 (1953), partially overruled on other grounds by *Rayonier Inc.* v. *United States*, 352 U.S. 315 (1957). The FTCA grew out of "a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite*, 346 U.S. at 24. At the same time, the FTCA does "not assure injured persons damages for all injuries caused by such employees," *id.* at 17, as it places a variety of limits on the United States' waiver of its immunity as well as on the scope of the United States' substantive liability under the Act. *Id.* at 17-18.

Among the FTCA's limits is the judgment bar contained in 28 U.S.C. 2676, which provides that an FTCA judgment cuts off the plaintiff's ability to pursue other avenues of relief against government employees based on the same conduct or transaction as the FTCA claim: "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. Thus, although the FTCA provides plaintiffs with the opportunity to sue a financially responsible defendant, subject to the limits and exceptions Congress placed on the government's liability, the judgment bar ensures that the government is protected from having to expend its re-

sources defending multiple actions or multiple theories of recovery arising out of the same incident.

2. Following extensive investigations by the Federal Bureau of Investigation (FBI), local police, and other authorities, petitioner was convicted of kidnapping in Missouri and murder in Illinois. Pet. App. 21a. These convictions were ultimately overturned: the Illinois Supreme Court reversed petitioner's murder conviction, and the Eighth Circuit granted habeas relief on his kidnapping conviction. *Id.* at 2a. Authorities elected not to retry petitioner on either charge. *Ibid.*

Petitioner subsequently filed a constitutional tort claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against two FBI agents, Robert Buchan and Gary Miller, seeking damages for his allegedly wrongful prosecution and imprisonment. Pet. App. 3a. In the same lawsuit, petitioner brought an FTCA claim against the United States, for the common-law torts of malicious prosecution and intentional infliction of emotional distress. *Ibid.*

In a pretrial order, the district court noted that Section 2676 could bar petitioner's *Bivens* claims if petitioner received a judgment on the FTCA claims. See Docket entry No. 157 (11/9/04 order setting petitioner's claims for trial). Beginning in December 2004, petitioner's claims were tried in a single, combined trial, with the *Bivens* claims tried to a jury and the FTCA claims tried to the district court. Pet. App. 3a, 19a. The jury found in favor of petitioner on his *Bivens* claim and awarded him $6.5 million in damages. *Id.* at 3a. While the district court had the FTCA claims under advisement, petitioner moved the court to enter judgment on the jury's verdict relating to the *Bivens* claims. *Id.* at

4a. In his motion, petitioner acknowledged the risk that under Section 2676, a subsequent judgment on his FTCA claim might nullify the *Bivens* judgment. *Id.* at 4a, 22a-23a.

In September 2006, the district court granted judgment to the United States on petitioner's FTCA claims. Pet. App. 4a. FBI agents Buchan and Miller moved to vacate the jury verdict on the *Bivens* claims pursuant to Federal Rule of Civil Procedure 59(e), arguing that the FTCA's judgment bar compelled vacatur of the *Bivens* judgment against them. Pet. App 4a. The district court granted the motion, noting that there "is no question that section 2676 applies in this case." *Id.* at 26a. The court explained that the plain meaning of Section 2676 established that the entry of judgment on petitioner's FTCA claim created a "complete bar to any action" based on the same subject matter, including petitioner's *Bivens* claims. *Ibid.* And because "it is firmly established that section 2676 bars a non-FTCA claim that i[s] determined simultaneously with an FTCA claim," the court reasoned, "it makes no sense to have the effect of section 2676 turn on how promptly the trial judge decides the FTCA claim when FTCA and non-FTCA claims are tried together." *Id.* at 34a. The district court therefore vacated the judgment on the *Bivens* claims. *Id.* at 37a.

3. The court of appeals affirmed. Pet. App. 1a-18a. Citing the consensus among the courts of appeals, the court held that Section 2676 is "plain and unambiguous" that an FTCA judgment serves as a bar to other claims brought within the same action, because the provision applies to "*any* action," and "a claim is necessarily part of an action." *Id.* at 7a; *id.* at 8a-9a. The court found that Congress's "choice of broad language" in the judg-

ment bar—"'a *complete* bar to *any* action'—makes clear that the bar was intended to apply to such claims." *Id.* at 8a.

The court also rejected petitioner's contention that its interpretation of Section 2676 effectively rendered the *Bivens* cause of action a nullity, noting that both causes of action remained open to plaintiffs, and that Section 2676 simply provided that a plaintiff could not pursue both claims to judgment. Pet. App. 10a. A plaintiff who brought both claims in one action and prevailed on the *Bivens* claim could, the court reasoned, voluntarily dismiss the FTCA claim in order to avoid the judgment bar. *Ibid.*

Having established that Section 2676 bars claims brought in the same suit, the court next rejected petitioner's argument that the judgment bar does not apply when the *Bivens* judgment is entered prior to the FTCA judgment in the same action. Pet. App. 14a-16a. The statutory language does not contain any temporal limitation, the court held, and permitting the operation of the judgment bar to turn on whether the *Bivens* or FTCA judgment is entered first would be arbitrary. *Ibid.* The intent of the judgment bar—to "prevent multiple lawsuits as well as multiple recoveries"—is best served, the court concluded, by consistently applying the judgment bar regardless of whether the *Bivens* or FTCA judgment is entered first. *Id.* at 15a (citing *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840, 859 (10th Cir. 2005)).

ARGUMENT

Petitioner renews (Pet. 7-22) his contention that Section 2676 does not bar "a *Bivens* claim brought in the same suit" as an FTCA claim. Pet. 7. The court of ap-

peals correctly held that the plain language of Section 2676 encompasses *Bivens* claims brought in the same suit. Although petitioner alleges a circuit conflict on the question, the other courts of appeals to consider the issue have overwhelmingly agreed with the Seventh Circuit. Only the Ninth Circuit has deviated from that consensus, and only in a limited respect. That court has held that although Section 2676 bars *Bivens* claims brought in the same action when the plaintiff prevails on her FTCA claims, Section 2676 does not bar claims when the FTCA judgment is adverse to the plaintiff. That limited disagreement does not merit this Court's review. Moreover, subsequent decisions of the Ninth Circuit suggest that that court may reconsider its position; therefore, certiorari is not warranted at this time.

1. The court of appeals correctly concluded that the plain text of Section 2676 provides that an FTCA judgment is a "*complete* bar to *any* action," 28 U.S.C. 2676 (emphasis added), including claims filed concomitantly with the FTCA claim itself. See, *e.g.*, *Serra* v. *Pichardo*, 786 F.2d 237, 239-240 (6th Cir.), cert. denied, 479 U.S. 826 (1986). Although petitioner urges (Pet. 19-21) that Section 2676 cannot bar *Bivens* claims brought in the same action as FTCA claims because a "claim" is distinct from an "action," the court of appeals correctly explained that the term "action" incorporates all elements of a civil suit, including the claims within that suit. Pet. App. 8a. As a result, "[b]y acting as a bar to *any* action, § 2676 bars the claims *within* that action." *Ibid.* Under petitioner's reading, Section 2676 "would bar 'any action,' but would not bar pieces of that action, *i.e.*, certain individual claims," a result that would be "inconsistent with the text of the statute." *Unus* v. *Kane*, 565 F.3d 103, 122 (4th Cir.) ("Because a

claim is a lesser part of an action," "all related claims [within the same action] must come within the ambit of § 2676."), petition for cert. pending, No. 09-294 (filed Sept. 3, 2009).

Congress's "choice of broad language" reflects its intent to go beyond "merely bar[ring] a plaintiff from bringing a subsequent identical action on the same claim." *Serra*, 786 F.2d at 239; see Pet App. 8a. Section 2676 is designed to protect against the drain on government resources that would result from multiple recoveries based on the same conduct, *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840, 859 (10th Cir. 2005), and that concern is equally operative when the multiple recoveries arise from parallel claims brought within a single lawsuit. Congress also intended to protect the government against the expenditure of resources that arises from having to defend multiple suits, see *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) (quoting congressional hearings), cert. denied, 515 U.S. 1144 (1995), and that purpose is likewise implicated when the government is forced to defend simultaneous claims against the government and its employees in one suit.[1] The court of appeals' reading of Section 2676 thus best comports with its purposes and congressional intent.

Accordingly, the courts of appeals have overwhelmingly agreed with the Seventh Circuit that an FTCA judgment bars a *Bivens* judgment on claims brought as part of the same action. See, *e.g.*, *Unus*, 565 F.3d at 122

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[1] Like the prosecution of multiple lawsuits, the pursuit of simultaneous claims against the government and its employees may increase the burden of discovery. In addition, because FTCA claims are tried before a judge but *Bivens* claims may be tried to a jury, the government may have to defend separate trials within the same action.

(finding FTCA judgment to bar *Bivens* judgment in the same suit); *Harris* v. *United States*, 422 F.3d 322, 334 (6th Cir. 2005) ("In accordance with the consistent application of the judgment bar over the fifty years since its enactment, we have held that [Section 2676] applies even when the claims were tried together in the same suit.") (internal quotation marks and citation omitted); *Trentadue*, 397 F.3d at 859 (applying Section 2676 to bar a *Bivens* judgment entered prior to the FTCA judgment in the same suit); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (holding that plaintiff's FTCA judgment against the United States barred his *Bivens* judgment in the same suit); *Arevalo* v. *Woods*, 811 F.2d 487, 490 (9th Cir. 1987); *Serra*, 786 F.2d at 241 (applying the judgment bar to a *Bivens* claim in the same action, the court noted that "it is inconsequential that the claims were tried together in the same suit"); *United States* v. *Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952) ("The District Court, having awarded a judgment in favor of [plaintiff] in his action against the United States, could not in the face of the explicit provisions of [Section 2676] order judgment against [the government employee] in favor of [the plaintiff] in the same action.").

Furthermore, all of the courts to consider the issue have agreed that an FTCA judgment requires vacatur of an earlier *Bivens* judgment in the same action. See, *e.g.*, *Trentadue*, 397 F.3d at 859 ("[T]he fact that the district court entered judgment on the *Bivens* claims before issuing its order and judgment in the FTCA case is inconsequential under § 2676."); *Engle* v. *Mecke*, 24 F.3d 133 (10th Cir. 1994); *Ortiz* v. *Pearson*, 88 F. Supp. 2d 151, 167 (S.D.N.Y. 2000). Indeed, nothing in the text of Section 2676 reflects a temporal requirement that only subsequent judgments be barred; rather, it applies to

"*any* action." 28 U.S.C. 2676 (emphasis added). As the court of appeals explained, "'any' means 'any,' regardless of the sequencing of the judgments."[2] Pet. App. 14a.

2. Petitioner contends (Pet. 8-9) that in *Kreines* v. *United States*, 959 F.2d 834 (1992), the Ninth Circuit departed from the consensus of the courts of appeals that an FTCA judgment bars *Bivens* claims brought in the same action. But the Ninth Circuit, like the other courts to consider the issue, has held that Section 2676 does apply when *Bivens* and FTCA claims are brought in the same action; at most, *Kreines* carved out an exception to that rule. And in any event, the reasoning behind *Kreines*'s exception has been undermined by subsequent Ninth Circuit precedent.

The Ninth Circuit first considered the judgment bar's application in a suit involving both *Bivens* and FTCA claims in *Arevalo*, 811 F.2d at 490. There, the court found that Section 2676 barred the *Bivens* claims, holding that "[t]he moment judgment was entered against the government" on the plaintiff's FTCA claim, "then by virtue of section 2676, [the federal employee] was no longer answerable to [plaintiff] for damages." *Ibid.* Thus, the Ninth Circuit recognized, like all other courts of appeals to consider the issue, that Section 2676

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[2] Indeed, a contrary rule would permit some plaintiffs "to escape the judgment bar's preclusive effect" in cases like this one, where the district court waited to enter judgment on the FTCA claim pending further discovery. *Trentadue*, 397 F.3d at 859. Such a rule would render Section 2676 arbitrarily dependent upon the timing of a district court's judgments. Instead, by consistently applying the judgment bar regardless of whether the *Bivens* or FTCA judgment is entered first, the court of appeals ensured a uniform application of Section 2676 consistent with Congress's intent.

bars recovery on *Bivens* claims even when those claims are brought as part of the same action as the FTCA claims. *Ibid.*

Subsequently, in *Kreines*, the Ninth Circuit acknowledged that *Arevalo* had held that pursuant to Section 2676, an FTCA judgment "barred a contemporaneous *Bivens* judgment against a federal employee" in the same suit. *Kreines*, 959 F.2d at 838. The *Kreines* court established an exception to that rule, holding that when the government prevails on a plaintiff's FTCA claim, Section 2676 did not bar the plaintiff from recovering on a *Bivens* claim brought within the same suit. *Ibid.* The court reasoned that Section 2676 was "ambiguous on the question of whether an FTCA judgment favorable to the government bars a contemporaneous *Bivens* judgment." *Ibid.* Because the court viewed the primary purpose of Section 2676 as preventing dual recoveries arising from subsequent litigation, the court concluded that Section 2676 should not bar a contemporaneous *Bivens* recovery when the government prevailed on the plaintiff's FTCA claim.

Two years after the *Kreines* decision, however, the Ninth Circuit limited *Kreines* to its facts and cast doubt on its reasoning. See *Gasho*, 39 F.3d at 1437. *Gasho* concerned the application of the judgment bar to a plaintiff's *Bivens* claims when the plaintiff had already brought and lost FTCA claims in a separate suit. The court held that "[t]he language [of Section 2676] is not 'ambiguous' or 'vague,'" and that—contrary to *Kreine*'s reasoning—the provision's plain language dictated that the judgment bar should apply regardless of whether the plaintiff had prevailed or lost on the FTCA claims. *Ibid.* ("The statute speaks of 'judgment' and suggests no distinction between judgments favorable and judgments

unfavorable to the government."). The court also cast doubt on *Kreines*'s reading of Section 2676's legislative history, concluding—like the court of appeals in this case—that because Congress was concerned not only with preventing dual recoveries, but also with protecting the government's resources in defending itself and its employees, the concerns animating the judgment bar are implicated even when there is no double recovery. *Ibid.* Thus, although *Gasho* concerned the application of Section 2676 to a subsequent suit, rather than to claims within a single suit (as in *Kreines*), *Gasho* casts doubt on the validity of *Kreines*'s reasoning that Section 2676 is ambiguous and that its application within a single suit should depend on whether the FTCA judgment was favorable.

In light of *Gasho*, and given that the Ninth Circuit has not applied *Kreines*'s holding in any subsequent decision, it is entirely possible that the Ninth Circuit will reconsider its position should the opportunity arise. That is particularly so given the consensus that has broadened since *Kreines* was decided, to the effect that Section 2676 applies to claims in "any action," regardless of whether the claims are brought within one action or the plaintiff prevailed on the FTCA claims.[3] Petitioner's

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[3] For the same reasons, any split of authority on whether the outcome of the FTCA decision determines the applicability of the judgment bar (Pet. 11) does not merit review. *Gasho* undermined *Kreines*'s suggestion, 959 F.2d at 838, that the legislative history indicates that Section 2676 should not bar *Bivens* claims in the same action when the plaintiff did not prevail on his FTCA claims. *Gasho*, 39 F.3d at 1437. No other court of appeals has suggested that the outcome of the FTCA judgment is relevant to the application of the judgment bar. Contrary to petitioner's suggestion (Pet. 11), *Trentadue* explicitly holds that the valence of the decision is irrelevant. 397 F.3d at 858 ("[T]he judgment bar in § 2676 precludes plaintiffs from bringing a *Bivens* claim regard-

asserted circuit conflict thus does not merit this Court's review.

3. Petitioner also contends (Pet. 11-17) that the court of appeals' decision conflicts with this Court's statement in *Carlson* v. *Green*, 446 U.S. 14, 20 (1980), that "Congress views FTCA and *Bivens* as parallel [and] complementary." Petitioner maintains (Pet. 13) that under the court's approach, FTCA and *Bivens* "causes of action are neither parallel nor complementary, but rather mutually exclusive," because the plaintiff may pursue only one to final judgment. Petitioner is incorrect.

In *Carlson*, this Court held that the fact that a plaintiff has an available claim under the FTCA does not automatically preempt the *Bivens* cause of action: both *Bivens* and FTCA claims are available to potential plaintiffs at the outset of a case. 446 U.S. at 20 (holding that plaintiffs "shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights"). But the fact that both causes of action are available does not mean that plaintiffs have a right to *recover* on both.[4] The Court did not hold, or even sug-

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ing the same subject matter regardless of whether the final FTCA judgment is rendered in favor of a plaintiff or the government.").

[4] Indeed, the Court has held in other contexts that the *Bivens* cause of action need not be available at all; Congress can opt to provide alternate remedies for constitutional torts even if those remedies offer less extensive relief than a *Bivens* action. See *Bush* v. *Lucas*, 462 U.S. 367, 380-389 (1983); *id.* at 372 (holding that the comprehensive statutory remedial scheme applicable to federal employees preempted *Bivens* actions even if "civil service remedies were not as effective as an individ-

gest, that an FTCA judgment has no effect on a plaintiff's *Bivens* remedy. The plaintiff in *Carlson* did not bring an FTCA claim, and thus the Court had no occasion to consider the effect of the judgment bar in that case. See *Serra*, 786 F.2d at 241 (reasoning that "the instant case, unlike *Carlson*, deals with the effect of a FTCA judgment on a plaintiff's power to continue to pursue a *Bivens* remedy"); see also *Sanchez* v. *Rowe*, 651 F. Supp. 571, 575 n.2 (N.D. Tex. 1986) ("[T]he holding in *Carlson* does not alter the plain meaning of § 2676 because *Carlson* did not deal with the effect of a FTCA judgment on a plaintiff's power to continue to pursue a *Bivens* remedy."); *id.* at 575-576.

Consistently with *Carlson*, the judgment bar permits a plaintiff to bring either an FTCA or a *Bivens* claim, or both. The existence of both causes of action gives plaintiffs a choice between two avenues of recovery—one based on the Constitution, and the other, on state tort law—arising from the same alleged conduct or transaction. See *Unus*, 565 F.3d at 121. But because the availability of both claims creates the potential for duplicative litigation and double recoveries, see *Will* v. *Hallock*, 546 U.S. 345, 354-355 (2006); *Hoosier Bancorp of Ind., Inc.* v. *Rasmussen*, 90 F.3d 180, 184-185 (7th Cir. 1996), Congress could reasonably decide to condition its waiver of sovereign immunity on a provision that alleviates these concerns by requiring plaintiffs to choose which claim they will bring to judgment.

Thus, the judgment bar simply affects a plaintiff's strategic calculus at the outset of the action and during

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ual damages remedy and did not fully compensate [the employee] for the harm he suffered") (footnote omitted); *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988) (declining to provide a *Bivens* remedy for Social Security claimants challenging the termination of their benefits).

its course. She can opt to bring either a *Bivens* or FTCA claim alone and pursue that claim to judgment; or she can opt to bring both claims in one action. See *Trentadue*, 397 F.3d at 858. The latter course may provide strategic advantages to a plaintiff, including the ability to utilize discovery to determine the relative strength of the two claims, and the ability to test the government's relative willingness to settle either claim. At the same time, such a plaintiff knows that at some point she must choose between the two claims, and if she decides to pursue relief under *Bivens*, she must conduct the litigation so as to avoid a receiving a judgment on the FTCA claim. Although bringing both claims in one action thus creates the risk that the judgment bar will be triggered, barring recovery on the *Bivens* claims, that risk is simply the trade-off for the advantages that a plaintiff may see in bringing both claims rather than one or the other. See *Unus*, 565 F.3d at 122 (noting that "[l]itigants frequently face tough choices," and that a plaintiff must account for the risk of the judgment bar in strategizing about contemporaneous *Bivens* and FTCA claims).

4. Although petitioner suggests (Pet. 2-4) that the application of the judgment bar to his case was inequitable, petitioner purposefully attempted to obtain judgments on both claims, despite his awareness of the judgment bar. See Pet. App. 9a-10a. Petitioner chose to have both his FTCA and *Bivens* claims adjudicated on the merits, and after obtaining a favorable verdict on his *Bivens* claims, petitioner specifically acknowledged, in a motion filed with the district court, that he was "aware[] of the risk that a judgment on the FTCA claim would nullify the Bivens judgment." *Id.* at 22a-23a. Nevertheless, as the district court found, petitioner con-

tinued to seek a judgment on his FTCA claim. *Id.* at 30a. The vacatur of petitioner's *Bivens* judgment was therefore the foreseeable result of his strategic decision to pursue his FTCA claims despite his knowledge of the risk of doing so.

Petitioner's argument thus reduces to the contention that he should have been allowed to pursue both claims to judgment and then decide which judgment he wanted to "keep." But that regime would be inconsistent with the text and purpose of the judgment bar, because it would give little protection to the employee-defendants or the government. See *Arevalo*, 811 F.2d at 490 ("We recognize that because the [*Bivens*] judgment * * * is greater than the judgment against the government, [plaintiff] might prefer to have the judgment against [the federal employee] rather than the judgment against the government. But it is too late for that choice.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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STEVEN MANNING,

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UNITED STATES OF AMERICA, ROBERT BUCHAN, AND GARY MILLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents dispute that a split of authority exists over the question presented in the petition, but ultimately concede that there is a "limited disagreement" among the lower courts. Opp'n 6. The split is not "limited" in any meaningful way, but even if it were so limited, it concerns precisely the question presented on the facts here: whether judgment for the government on an FTCA claim bars the plaintiff's concurrent *Bivens* claim. Respondents concede that in *Kreines* v. *United States*, 959 F.2d 834 (9th Cir. 1992), the Ninth Circuit resolved that issue opposite to the way the Seventh Circuit did below. Opp'n 10.

Respondents' entire argument that a split does not exist is based on their over-reading of the Ninth Circuit's decision in *Gasho* v. *United States*, 959 F.2d 834 (9th Cir. 1995). Opp'n 9-12. But *Gasho* neither raised the issue, nor commented on its resolution in *Kreines*. Further, respondents' suggestion that *Gasho* sounded the death knell for *Kreines* is hard to square with the passage of fourteen years without its demise, and the lower courts' continued application of it. E.g., *Palma* v. *Dent*, No. C 06-6151 PJH, 2007 WL 2023517, *5 (N.D. Cal. July 12, 2007); *Kyei* v. *Beebe*, No. CV01-1266-PA, 2005 WL 30504424, *2 (D. Or. Nov. 5, 2005). The split of authority is unresolved and this case presents an ideal opportunity to resolve it.

Respondents' effort to reconcile the Seventh Circuit's decision with this Court's decision in *Carlson* v. *Green*, 446 U.S. 14 (1980), is strained. Opp'n 12-14. Respondents concede that, under the Seventh Circuit's decision, the only purposes for which a plaintiff may pursue *Bivens* and FTCA claims together are "to determine the relative

strength of the two claims, and ... to test the government's relative willingness to settle." Opp'n 14. And respondents acknowledge that even these "advantages" are available only to one who would risk everything on his ability to "conduct the litigation so as to avoid receiving a judgment on the FTCA claim." Id. Such a regime cannot be squared with this Court's plain statement that "Congress views FTCA and *Bivens* as parallel [and] complementary." *Carlson*, 446 U.S. at 20.

Respondents' remaining arguments rest on their view that the Seventh Circuit's decision was neither erroneous nor inequitable. Opp'n 6-9, 14-15. But those are not reasons for denying a petition for certiorari. S. Ct. Rule 10. In any event, respondents' attempt to reconcile the Seventh Circuit's decision with the plain text of the judgment bar rests on circular logic, which results in the judgment here barring itself. Further, without disputing that the individual respondents framed petitioner for murder and kidnapping, causing him to be wrongly imprisoned for 14 years, respondents contend that the result, which deprived him of any remedy, was nevertheless just because petitioner acknowledged awareness of the judgment bar in the weeks before trial and, by proceeding, assumed the risk it would apply. Respondents' contention depends on the premise that petitioner could have somehow avoided a judgment on his FTCA claim at that late date. As argued in the petition, a judgment on his FTCA claim was already inevitable, and so voluntary dismissal of that claim would not have diminished the risk that his *Bivens* claim would be barred. Pet. 14-16.

In sum, the petition presents an ideal vehicle for reviewing a mature split of authority and for

correcting the misapplication of this Court's decision in *Carlson*. The petition should be granted.

1. The split of authority described in the petition is undeniable. Respondents' efforts to minimize it fail.

Respondents admit that the Ninth Circuit in *Kreines* held that the judgment bar does not apply to a concurrent *Bivens* claim if, as here, the government prevailed on the FTCA claim. Opp'n 6, 10. In other words, under *Kreines*, petitioner would have been entitled to keep his *Bivens* judgment.

Respondents nevertheless struggle to avoid admitting that a split of authority exists, ultimately conceding only that there is a "limited disagreement [which] does not merit this Court's review." Opp'n 6. It is not clear what respondents are arguing. Respondents cannot mean to argue that this Court's review is unwarranted because the split is too one-sided. This Court commonly reviews well-developed splits of authority, notwithstanding that one side has few or one adherents. Instead, respondents appear to contend that this Court should ignore the split because it covers too narrow an issue. But, as already explained, however "limited," the split is fully implicated here.

Respondents attempt to diminish the split by arguing that the Ninth Circuit's decision in *Gasho* undermined *Kreines's* reason for distinguishing *Arevalo*, suggesting that the Ninth Circuit itself is poised to overrule *Kreines*. Opp'n 9-12. A close reading of those decisions does not support respondents' view. It is true that, in *Arevalo*, the court applied the judgment bar to preclude a concurrent claim. But the plaintiff did not argue against the bar's application on the ground that the

claims had been asserted together, arguing instead that claims based on the Constitution are not "claims by reason of the same subject matter" as FTCA claims. 811 F.2d. at 489. The court held that the constitutional nature of *Bivens* claims do not place them beyond the reach of the judgment bar. Id. at 490. The court did not discuss why the bar should apply to a concurrent claim. Id.

In *Kreines*, the Ninth Circuit also faced the government's assertion of the judgment bar to a claim in the same suit, and in that case the court explicitly addressed the issue. 959 F.3d at 838. The court found the statute ambiguous on its application to concurrent claims: "the language of the [judgment bar] ... fails to resolve the question of whether the bar applies to other claims raised in the same action". Id. Turning to the legislative history, the court found that Congress's intent in enacting the bar "was to prevent multiple lawsuits on the same facts." Id. The court then observed "[t]hat concern is absent when suit is brought contemporaneously for FTCA and other relief". Id. Distinguishing *Arevalo*, the court reasoned that the concurrent *Bivens* claim was barred in that case because the plaintiff had prevailed on his FTCA claim, and would otherwise have received a double recovery.[1] Id. Because in *Kreines* (as here) the plaintiff had lost on his FTCA

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[1] Indeed the court in *Arevalo* had explicitly limited its analysis to FTCA judgments against the government, stating the issue before it this way: "whether a judgment entered *against the government* under the FTCA precludes a judgment against a government employee on a *Bivens* claim when the employee's conduct which resulted in the judgment against the government is the same conduct which forms the basis for the *Bivens* claim." Id. at 489 (emphasis added).

claim, that concern was not implicated, and so the court held the bar did not apply. Id. Far from being an "exception" to general application of the FTCA judgment bar, as respondents contend, Opp'n 9, the ruling in *Kreines* evenly divided the world into cases where the judgment bar does (where the FTCA judgment is for the plaintiff) and does not apply (where the FTCA judgment is for the government).

Respondents argue that *Gasho* sounded the death knell for *Kreines*. Opp'n 9. As respondents recognize, however, *Gasho* raised a different issue: whether final judgment on an FTCA claim bars a *Bivens* claim brought for the same injury, not in the same suit, but in a subsequent suit. 39 F.3d at 1436. The court thus had no occasion to consider the statutory interpretation in *Kreines* that led the court to conclude that the bar does not apply to concurrent claims. Rather, the issue in *Gasho* was the plaintiff's call to extend *Kreines's* "quality of the judgment" rationale to claims brought in a subsequent suit. The court determined that the judgment bar's paramount concern is to avoid multiple lawsuits over the same facts, and that the outcome of a prior FTCA action is irrelevant to that concern. Id. Petitioner does not quarrel with that reasoning. It was in the context of establishing that Congress's primary concern in erecting the judgment bar was to avoid multiple lawsuits that the court in *Gasho* stated that "*Kreines* was narrowly confined to its facts." Id. But respondents are wrong to suggest that the statement can be read to cast doubt on the statutory interpretation in *Kreines* that led the court to conclude that the bar does not apply to claims in the

same action, Opp'n 10, because no such claims were presented.[2]

Respondents' s uggestion that *Gasho* sign aled the end of any part of *Kreines* is belied by the passage of fourteen years without its demise. Certainly, the lower courts continue to apply it. E.g., *Palma*, 2007 WL 2023517, at *5; *Kyei*, 2005 WL 30504424, at *2. If *Gasho* cast doubt on any aspect of *Kreines* it was only *Kreines*'s "quality of the judgment" rationale for distinguishing *Arevalo*. But even had *Gasho* completely tore down the veil between *Arevalo* and *Kreines*, respondents would be wrong to conclude that *Kreines*, rather than *Arevalo*, is the decision in jeopardy. As the more recent decision, and the only decision with any analysis of the judgment bar's application to concurrent claims, *Kreines* more likely reflects the Ninth Circuit's current view on the issue.

Indeed, in a decision up for this Court's review this term, the Ninth Circuit gave reason to doubt that *Arevalo* remains good law. In *Castaneda* v. *United States*, 546 F.3d 682 (9th Cir. 2008) cert. granted No. 08-1529, 2009 WL 1649115 (Sep. 30, 2009), the Ninth Circuit decided an interlocutory appeal on the issue that this court will decide: whether 42 U.S.C. § 233(a) makes the FTCA the exclusive remedy for claims arising from medical care provided by Public Health Service personnel, thus barring *Bivens* actions.

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[2] Likewise, when respondents contend that "*Gasho* casts doubt on the validity of *Kreines*'s reasoning that Section 2676 is ambiguous," Opp'n 11, that is true only insofar as *Kreines* found the bar ambiguous as to the "quality of judgment." As already discussed, *Gasho* is simply irrelevant to the *Kreines* court's reasoning that the bar is ambiguous as to its potential application to concurrent claims.

However, while that appeal was pending, the government admitted liability on the FTCA claim, making an eventual judgment in plaintiff's favor on that claim inevitable. If *Arevalo* were still good law, the Ninth Circuit presumably would have dismissed the appeal and remanded for a determination of damages because the ensuing judgment on the FTCA claim would have barred the disputed *Bivens* claims, and thus mooted the need to decide the interlocutory appeal. That the court instead decided the issue suggests that *Arevalo* does not mean what the government here contends. And by pressing forward with its interlocutory appeal in *Castaneda*, even so far as urging this Court to accept review, the government has implicitly acknowledged that *Arevalo* will not govern on remand.

The split of authority is real and fully implicated here. Its depth and persistence belies respondents' contention that the courts will achieve uniformity without this Court's intervention.

2. Respondents' attempt to reconcile the Seventh Circuit's decision with this Court's decision in *Carlson* fails. Respondents do not dispute that, under the Seventh Circuit's holding, a plaintiff is permitted to allege *Bivens* and FTCA claims together, but must elect before an unspecified deadline which to pursue to judgment. Opp'n 12-14. Respondents suggest two "strategic advantages" that a plaintiff might see in nonetheless pursuing the claims concurrently: "to utilize discovery to determine the relative strength of the two claims,[3] and ... to test the government's

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[3] Respondents argue elsewhere, however, that the mere burden of engaging in discovery on both the *Bivens* and FTCA

relative willingness to settle either claim." Opp'n 14. According to respondents, a plaintiff who would avail himself of these "strategic advantages," however, must "conduct the litigation so as to avoid receiving a judgment on the FTCA claim." Id. Respondents do not deny, as detailed in the petition, Pet. 14-16, that it is impossible for even an experienced litigant (much less, as is common in these cases, a *pro se*) to know how far he may press his FTCA claim before a judgment will result. On respondents' view, that uncertainty and "risk is simply the trade-off" for pursuing the strategic advantages a plaintiff may see in pursuing the claims together for a time. Opp'n 14.

Respondents fail to explain how the described remedial scheme is compatible with the court's conclusion in *Carlson* that "Congress views FTCA and *Bivens* as parallel [and] complementary," *Carlson*, 446 U.S. at 20. In coming to that conclusion, the Court relied on the Senate Committee Report explaining the amendment that expanded the FTCA's waiver of sovereign immunity to cover intentional torts. S. Rep. No. 93-588, at 3 (1973). The Committee explained that the amendment was prompted by a number of unconstitutional "no-knock" raids by federal officers, the "most notorious" of which occurred in Collinsville, Illinois. Id. at 2. The Committee observed that "there is no effective legal remedy against the Federal Government" for such abuses and, against that background, described the amendment's effect:

> Thus, after the date of enactment of this measure, innocent individuals who are subjected

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claims justifies the Seventh Circuit's application of the judgment bar to a concurrent *Bivens* claim. Opp'n p. 7.

> to raids of the type conducted in Collinsville, Illinois, will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the *Bivens* case and its progeny.

Id. at 3.

On respondents' view, however, the Committee should have said that, after the amendment's effective date, "innocent individuals ... will have a cause of action against the individual Federal agents and the Federal Government," *but a remedy against only one or the other*, and should they unwittingly pursue their new FTCA claim for an unspecified length of time that results in a judgment, they will forfeit their *Bivens* claim.

Simply put, it defies belief that the Congress would have foisted such a regime, fraught with traps for the unwary, upon victims in the guise of trying to help them.

3. Respondents' remaining arguments that the Seventh Circuit's decision was right, and did not result in a miscarriage of justice, rest on considerations that are not part of the Court's decision whether to grant review, and thus not reasons to deny the petition. S. Ct. Rule 10. In any event both arguments are wrong.

In respondents' lead argument, they contend that the Seventh Circuit correctly found that the judgment bar's plain text compels its application to concurrent claims. Opp'n 6-9. Petitioner pointed out that construing the barred "action" to include the same action giving rise to the bar results in a vicious

circle.[4] Pet. 19. Respondents defend the Seventh Circuit's attempt to extricate itself from this paradox by reading the barred "action" to mean any "claims" comprising the action. Opp'n 6.

Reading "bar to any action" to mean the claims within the action does not avoid the circularity, but simply shifts the problem to the predicate "judgment." An action gives rise to only one final judgment, and that judgment is "the judgment" in the action. "The judgment in an action [under the FTCA]" thus plainly means final judgment. Final judgment does not arise until all the claims of the parties have been adjudicated. Fed. R. Civ. P. 54(b). Under the doctrine of "merger," final judgment in turn extinguishes the action, including all its component claims. Restatement (Second) of Judgments § 18 (1982). Thus, "the judgment in an action under [the FTCA]" arises only after the FTCA claim *and all claims brought in the same action* have been adjudicated. And the instant that occurs, all claims comprising the action and the action itself are extinguished. Under the statute's plain meaning then, no bar can arise until after the FTCA claim and any concurrent *Bivens* claim have been both adjudicated and extinguished. This one and final judgment can no more bar the *Bivens* claim than it can bar the FTCA claim.

Finally, respondents try to defend the fairness of the result in this case by suggesting that petitioner's own "strategic decision" is to blame. Opp'n 14-15. But there is no dispute here that the individual

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[4] The judgment bar provides: "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action" by the claimant for the same injury. 28 U.S.C. § 2676.

respondents framed petitioner for murder and kidnapping, causing him to be wrongly imprisoned for 14 years. Respondents rely on a pretrial order as putting petitioner on notice, and petitioner's motion for entry of judgment on the jury verdict as acknowledging the risk, that a judgment on the FTCA claim might trigger the bar. Opp'n 3, 14-15. As detailed in the petition, by the time of the pretrial order and motion for judgment, it was too late to avoid a judgment on the FTCA claim. Pet 14-16. Tellingly, respondents do not dispute this is true, or claim that they would not have vigorously opposed voluntary dismissal of the FTCA claim without prejudice. At that point, then, petitioner's only hope for saving his *Bivens* claim was that the Court would construe the bar not to apply. Nothing petitioner did from that point on could or did increase that risk.

* * *

Judgment on petitioner's FTCA claim was held to bar his parallel *Bivens* claim. This case thus presents an ideal vehicle for resolving a mature split of authority on an important question affecting the rights of every individual injured by the intentional conduct of federal employees.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

STEVEN MANNING,
Petitioner,

v.

UNITED STATES OF AMERICA, ROBERT BUCHAN, AND GARY MILLER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE RODERICK MACARTHUR JUSTICE CENTER, PROFESSOR JAMES ALEXANDER TANFORD, THE SETON HALL LAW SCHOOL CENTER FOR SOCIAL JUSTICE, THE KING HALL CIVIL RIGHTS CLINIC, AND THE EDWIN F. MANDEL LEGAL AID CLINIC AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The Roderick MacArthur Justice Center (the Justice Center) operates as a nonprofit public-interest law firm at Northwestern University School of Law. The Justice Center litigates issues of significance for the criminal justice system, including the representation of wrongfully convicted persons in civil rights actions seeking monetary compensation for time unjustly served in prison.

Professor James Alexander Tanford, Professor of Law at Indiana University Maurer School of Law, has extensive experience in civil rights torts litigation. Admitted to the U.S. Supreme Court and the Fourth, Sixth, Seventh and Eleventh Circuits, he has been working with the ACLU on civil rights cases since 1992.

Both the Seton Hall Law School Center for Social Justice and the King Hall Civil Rights Clinic at the U.C. Davis School of Law provide pro bono representation to indigent clients in a wide variety of substantive areas. The Center for Social Justice's Impact Litigation Clinic takes on federal in forma pauperis appeals and regularly represents clients with FTCA claims and/or *Bivens* claims.

The Edwin F. Mandel Legal Aid Clinic at the University of Chicago Law School renders assistance

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

to indigent clients. The Clinic's mission is to examine the effect of legal institutions on the poor, serve as advocates for people typically denied access to justice, and reform legal education and the legal system to be more responsive to the interests of the poor.

All *amici* have a keen interest in protecting the rights of individuals seeking remedies for unconstitutional official misconduct. Based on our extensive experience, the Seventh Circuit's decision below compromises the remedial and deterrent function of our criminal justice system. The deepening Circuit split will also result in unfair and inefficient administration of justice.

SUMMARY OF ARGUMENT

The undersigned *amici*, having extensively represented the wrongfully accused or convicted both in the underlying criminal actions and in subsequent civil rights actions, recognize that there is a heavy burden on those who seek remedies for the harm caused by unconstitutional police and prosecutorial misconduct. *Bivens* actions and FTCA claims, which the Court has recognized as "parallel, complementary causes of action," *Carlson v. Green*, 446 U.S. 14, 20 (1980), complement each others' inadequacy in their remedial power. Allowing 28 U.S.C. § 2676 (2006) of the Federal Tort Claims Act (the FTCA) to nullify an earlier successful *Bivens* judgment will significantly diminish the remedies for these aggrieved individuals. Furthermore, these aggrieved individuals should be able to bring both *Bivens* claims and FTCA claims in a single lawsuit, because both claims are indispensible to effectively deter unconstitutional official misconduct. Finally, the Seventh Circuit rule, along with conflicting holdings in the Courts of Appeals, has presented an important unresolved

federal question. If left intact, this split on how § 2676 affects a prior judgment will continue to cause unfairness and inefficiency in the vindication of constitutional rights.

In sum, this Court should grant certiorari to resolve the split in the Courts of Appeals, which has an over-reaching negative impact on victims of unconstitutional official misconduct across the nation.

ARGUMENT

I. IN ORDER TO PROVIDE A COMPREHENSIVE REMEDIAL SCHEME FOR VICTIMS OF UNCONSTITUTIONAL MISCONDUCT, BOTH *BIVENS* CLAIMS AND FTCA CLAIMS SHOULD BE RAISED IN A SINGLE SUIT.

Unconstitutional official misconduct has presented a serious social problem. For example, a 2002 Department of Justice report showed that more than 2,000 complaints about excessive use of police force were found to have merits.[2] In addition, one observer estimates that there could have been tens of thousands of wrongful convictions from 1989 to 2003.[3] Our experience suggests that these aggrieved individuals have to overcome substantial hurdles to obtain legitimate relief.

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[2] MATTHEW J. HICKMAN, PH.D., CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 6 (June 2006), http:// www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf.

[3] Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 551 (2005) (stating that "[a]ny plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands.").

As an effort to rectify this deficiency in our legal system, the Court established a federal common law cause of action for damages against individual officials in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971). Congress, also noticing the insufficient remedies available to victims of constitutional wrongs, amended the FTCA to cover cases of law-enforcement-related torts by federal officials. Reorganization Plan No. 2 of 1973, Pub. L. 93-253, § 2, 88 Stat. 50, 50 (1974).

Neither *Bivens* nor the FTCA, standing alone, provides an adequate remedy to those injured at the hands of Federal officials in cases involving the violation of constitutional rights. Retroactively applying 28 U.S.C. § 2676 (2006) of the FTCA to an earlier successful *Bivens* judgment will significantly diminish the already limited remedies for these aggrieved individuals.

A. Our Legal System Heavily Burdens the Relief-Seeking Process for the Aggrieved Individuals of Unconstitutional Official Misconduct.

Our experience with wrongfully convicted individuals, among thousands of victims of egregious unconstitutional official misconduct each year, illustrates the tremendous hurdles faced by these individuals on their odyssey to seek relief. With official misconduct as a major cause for wrongful convictions,[4] "fewer than thirty-three percent of exonerated individuals receive relief." BARRY SCHECK ET AL.,

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[4] The Innocence Project, *Government Misconduct*, *available at* http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited July 22, 2009).

ACTUAL INNOCENCE 298. (New Am. Library 2003). This is true even though the exonerated have suffered significant harm:

> The agony of prison life and the complete loss of freedom are only compounded by the feelings of what might have been, but for the wrongful conviction. Deprived for years of family and friends and the ability to establish oneself professionally, the nightmare does not end upon release. With no money, housing, transportation, health services or insurance, and a criminal record that is rarely cleared despite innocence, the punishment lingers long after innocence has been proven.[5]

Our legal system imposes enormous burdens on these aggrieved. Their claims might well be barred by unfavorable statues of limitations. *See, e.g., Wallace v. Kato*, 549 U.S. 384, 397 (2007) (deciding a 42 U.S.C. § 1983 claimant for a false arrest was subject to the statute of limitation running from the time of the detention pursuant to legal process rather than when the conviction was set aside). Moreover, as defendants, the officials are likely shielded from personal liability under the doctrines of absolute or qualified immunity. Jessica R. Lonergan, *Note: Protecting the Innocent: a Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 409 (2008). An option to sue the government might also be foreclosed because "the barrier of sovereign immunity is

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[5] The Innocence Project, *Fact Sheets - Compensating the Wrongly Convicted*, *available at* http://www.innocenceproject.org/Content/309PRINT.php (last visited July 18, 2009).

frequently impenetrable." *Butz v. Economou*, 438 U.S. 478, 504-05 (1978). As a result, between 1971 and 1985, plaintiffs of federal unconstitutional misconduct obtained a judgment that was not reversed on appeal in only four cases out of approximately 12,000 damages claims. Cornelia T.L. Pillard, *Taking Fiction Seriously: the Strange Results of Public Officials' Individual Liability under* Bivens, 88 GEO. L.J. 65, 66 (1999).

The identity of these victims and the nature of constitutional violations by federal officials also account for the very low success rates of damages suits. The plaintiffs are usually racially underrepresented and frequently described as "unattractive." *Project: Suing the Police in Federal Court*, 88 YALE L.J. 781, 791-92. (1979). Some plaintiffs might also have criminal records. *Id.* at 798. None of these characteristics are appealing in a jury trial. Even worse, the plaintiffs might have difficulty identifying the responsible individual officials to sue because the event at issue can take place when the officials act in anonymity. Note, *"Damages or Nothing"-The Efficacy of the Bivens-Type Remedy*, 64 CORNELL L. REV. 667, 674 (1979).

B. *Bivens* Actions and FTCA Claims Complement Each Other to Provide a Comprehensive Remedial Scheme for Victims of Federal Official Misconduct

Because "[i]njunctive or declaratory relief is useless" when measured against the sufferings of these individuals, their relief is "damages or nothing." *Butz*, 438 U.S. at 504-05. In *Bivens*, 403 U.S. at 397, this Court held that violation of certain federal unconstitutional rights, such as illegal arrest, search and seizure by federal law enforcement agents, gave rise

to a federal common law cause of action for damages against the agents.

Despite the efforts by this Court, plaintiffs currently have little chance of recouping actual damages through *Bivens* actions. *Bivens* plaintiffs are estimated to obtain a judgment awarding damages in less than one percent of *Bivens* cases filed. Pillard, 88 GEO. L.J. at 66. Juries and judges are reluctant to award damages against individual federal employees, because of the "aura of authority and honesty surrounding their office." 88 YALE L.J. at 800. Even if a judgment has been entered for the plaintiff on the *Bivens* claim, the defendant individual official is often judgment proof, 64 CORNELL L. REV. at 692, not to mention that *Bivens* claims have only been allowed in very limited scenarios of constitutional violations.[6]

Pursuing a parallel FTCA claim improves the likelihood for *Bivens* plaintiffs to get compensated. For one thing, the government does not possess a personal identity. Therefore, an FTCA claim is less likely than a *Bivens* claim to be dismissed merely because of the plaintiff's failure to identify an anonymous federal agent. Furthermore, the government will likely serve as an alternative source for plaintiffs to collect damages from.

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[6] The Court has allowed a *Bivens* action against federal officers in two other contexts. *Carlson v. Green*, 446 U.S. 14, 18 (1980) (*Bivens* action allowed for violations of the Eighth Amendment); *Davis v. Passman*, 442 U.S. 228, 243-44 (1979) (*Bivens* action allowed for violations of the Due Process Clause of the Fifth Amendment). *Bivens* actions have been barred in many other contexts. *See, e.g.*, *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (barring *Bivens* actions against private corporations operating federal correctional facility).

Indeed, when Congress amended the FTCA to waive sovereign immunity for certain intentional torts, its purpose was primarily remedial. Congress was aware that *Bivens* plaintiffs were usually undercompensated, and especially that "[f]ederal agents are usually judgment proof." S. REP. NO. 93-588 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2790. Specifically, Congress's goal was to provide "innocent individuals . . . [with] a cause of action against the individual Federal agents *and* the Federal government." S. REP. NO. 93-588, *as reprinted in* 1974 U.S.C.C.A.N. at 2791 (emphasis added). In fact, Congress adopted the view that the FTCA should "be viewed as a counterpart to the *Bivens* case and its progeny, in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*." *Id.* A "counterpart" is not a substitute. Congress has specifically refused to make FTCA claims the exclusive remedy for constitutional violations by federal employees. *See, e.g.*, S. 2558, 93d Cong., 1st Sess. (1973) (Congress's rejection of the Justice Department's proposal to make the FTCA the exclusive remedy in all cases of federal constitutional violations).

In fact, Congress never intended the FTCA to fulfill a comprehensive remedial purpose. For example, while *Bivens* jurisprudence is built on a coherent body of federal common law, the weakest aspect of the FTCA remedy lies in that it subjects the plaintiff to "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (2006). It is highly doubtful, however, that state law alone will be sufficient to provide remedies for constitutional violations. As Justice Harlan said in *Bivens*, the interests

protected by state tort law and by constitutional provisions "may be inconsistent or even hostile [to each other]." 403 U.S. at 394 (Harlan, J., concurring). To illustrate, it is possible the state law provides defenses to certain torts which would otherwise be prohibited under the Constitution. Moreover, the FTCA has a restrictive statute of limitations, 28 U.S.C. § 2401(b) (2006), and a prerequisite of final administrative disposition of the claim, 28 U.S.C. § 2675(a) (2006), which is not required in a *Bivens* action. In this sense, *Bivens* claims are necessary to make up for the limitations of the FTCA.

Now, under the Seventh Circuit rule, even if victims of unconstitutional official misconduct have cleared all of the hurdles and won on a *Bivens* claim, their recovery will be barred by a subsequent or simultaneous FTCA judgment under 28 U.S.C. § 2676. This effectively forces plaintiffs with viable *Bivens* and FTCA claims to choose which claim to pursue—and which to abandon—before even stepping into court. Because fair redress for victims of federal law-enforcement misconduct is only possible if the FTCA and *Bivens* can work together "as parallel, complementary causes of action," *Carlson*, 446 U.S. at 20, the interests of the aggrieved victims of unconstitutional official misconduct are harmed if either FTCA or *Bivens* claims are discouraged by an inconsistent interpretation of 28 U.S.C. § 2676.

II. THE SEVENTH CIRCUIT RULE INSUFFICIENTLY DETERS ABUSES OF CONSTITUTIONAL AUTHORITY BY FEDERAL OFFICERS.

A basic tenet of our legal system is that individuals are responsible and accountable for their acts of

misconduct—this can only be achieved when *Bivens* claims are raised along with FTCA claims. In fact, this Court has made clear that the threat of suit against the United States is insufficient to deter the unconstitutional acts of federal officers. *Carlson*, 446 U.S. at 21 ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy."). "It must be remembered," this Court stated later, "that the purpose of *Bivens* is to deter the officer." *FDIC v. Meyer*, 510 U.S. 471, 485 (1994). In this sense, the decision below defeats an effective deterrent mechanism made possible only through cooperation between *Bivens* claims and FTCA claims.

Indeed, a *Bivens* claim supplements an FTCA claim's inadequate deterrent effect. Punitive damages are permitted under a *Bivens* claim, while the FTCA prohibits punitive damages, 28 U.S.C. § 2674 (2006), and has a discretionary act exception, 28 U.S.C. § 2680(a) (2006). Because of these FTCA limitations, a judgment on the FTCA claim commonly yields a smaller damages award than does the *Bivens* claim. *See, e.g., Engle v. Mecke*, 24 F.3d 133, 134 (10th Cir. 1994) (vacating a *Bivens* judgment because an FTCA action barred any other judgments, even though the plaintiff won $351,000 on the *Bivens* claim but only $28,000 on the FTCA claim). Based on our experience, victims of official misconduct, including most of our wrongfully convicted clients, usually receive only small awards against the government years after the violation of their rights occurred. This frequent delay in the administration of justice makes punitive damages, which are only available under a *Bivens* claim, an essential mechanism to deter unconstitutional behavior by individual federal agents.

Second, *Bivens* claims do not have the caveats of internal agency oversight, the only means to discipline federal officials if liability is imposed on the government alone under the FTCA. Extensive doubt exists as to the effectiveness of internal discipline, which is typically not subject to outside review.[7] In contrast, under a *Bivens* claim, individual officials, once held liable for the wrongs they have committed and bound by economic incentives, will be more effectively "disciplined" by courts.

Allowing a *Bivens* claim to be raised along with an FTCA claim is in keeping with Congress's approval of the idea that federal employees should be personally accountable for their wrongful conduct. *See, e.g.*, S. REP. NO. 469, 93d Cong. 1st Sess. 36 (1973) (noting "important deterrent value served by the threat of civil suits being brought against offending agents [means that federal] officers must realize that they will be held personally responsible for their intentional violation of constitutional rights.").

Unfortunately, the Seventh Circuit's holding will substantially frustrate the deterrence scheme created by the complement between *Bivens* claims and FTCA claims.

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[7] *See Federal Tort Claims Act: Hearings on S. 1775 Before the Subcommittee on Agency Administration of the Senate Committee on the Judiciary*, 97th Cong., 1st & 2d Sess. pt. 2, at 4-7 (1982) (testimony of FBI Director William Webster explaining the FBI's disciplinary procedure); *Amendments to the Federal Tort Claims Act: S. 2117: Joint Hearing Before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. pt. 1 (1978) (stating that agencies have disciplined their employees for constitutional torts only after being subjected to intense outside pressure to do so).

III. THE SEVENTH CIRCUIT RULE WILL RESULT IN UNFAIR AND COSTLY ENFORCEMENT OF CONSTITUTIONAL RIGHTS.

Alexander Hamilton wrote that without the "uniform interpretation of the national laws" afforded by a centralized federal judiciary, "nothing but contradiction and confusion can proceed." THE FEDERALIST NO. 80 at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The issue of how § 2676 should be applied to a prior judgment in the same action, has been addressed differently in the Courts of Appeals[8] and therefore presents an important federal question that calls for a prompt resolution by this Court.

First, the reliance on the conflicting precedents in different Courts of Appeals in the application of § 2676 will result in some plaintiffs being treated differently from others similarly situated based on where their constitutional rights were violated by a federal official. The arbitrary and unjust aspect of our system reflected by this lack of uniformity will erode public confidence, particularly because important constitutional rights are at stake here.

In addition, the lack of uniformity introduces difficulties and inefficiencies for non-profit groups like the *amici* to serve as advocate for aggrieved individ-

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[8] For decisions that have held that an FTCA judgment did not bar a *Bivens* claim in the same suit, *see Kreines v. United States*, 959 F.2d 834, 838 (9th Cir.1992). For decisions that have decided that an FTCA judgment bar applied to a judgment on a *Bivens* claim in the same suit, *see Unus v. Kane*, 565 F.3d 103, 122 (4th Cir.2009); *Harris v. United States*, 422 F.3d 322, 333-35 (6th Cir.2005); *Estate of Trentadue ex. rel. Aguilar v. United States*, 397 F.3d 840, 858 (10th Cir.2005); *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir.1989).

uals wronged by official misconduct. Our clients are often indigent and rely on non-profit organizations for representation. With an incoherent, inconsistent, and unpredictable body of laws governing our clients' right to seek damages, the *amici*, who take cases originating from various jurisdictions, will waste their precious resources. Eventually, dwindling funding will compromise the constitutional rights of our clients.

As a result, this Court should promptly re-evaluate the far-reaching negative effect of the current Circuit split, which will likely result in an unfair and costly system of enforcement of federal constitutional rights.

CONCLUSION

For these reasons, and for those stated by petitioner, the petition for a writ of certiorari should be granted.

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